United States District Court
Southern District of Illinois

ERIC WELCH, 10444-089 Petitioner, v. WILLIAM TRUE – WARDEN, U.S. Penitentiary – Marion, Respondent.	))))))))	Habeas No. 17-478-DRH

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SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS OFFICE

PETITION FOR A WRIT OF HABEAS CORPUS
28 U.S.C. § 2241

Eric Welch appears *pro se*, and petitions the Court for a Writ of Habeas Corpus under 28 U.S.C. Section 2241, in light of the United States Supreme Court decision in *Mathis v. United States*, 136 S.Ct. 2243 (2016).

In *Mathis*, the Supreme Court held that a state statute that provides alternative means for committing an element of a crime – that are broader than the elements of the generic crime (in that case an Iowa burglary) – is not a predicate offense to trigger an aggravated sentencing enhancement.

I. Ground for Review

Whether, In Light Of *Mathis*, Petitioner's 10-Year Statutory Mandatory-Minimum Sentence Under 18 U.S.C. § 2252A(b)(2) (Together With Related Guideline Enhancements, and Terms of Supervised Release), Are a Miscarriage of Justice, Because his Michigan Conviction Is Broader (in At Least Three Ways) Than the Federal Statute Punishing a Prior State Misdemeanor Sex Offense

II Statement of Jurisdiction

Title 28 United States Code, Section 2241 confers jurisdiction on district courts to issue writs of habeas corpus in response to a petition from a state or federal prisoner who "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. 2241(a) and (c)(3). A petition for habeas corpus under 28 U.S.C. § 2241 must be filed in the district of confinement. See *Light v. Caraway*, 761 F.3d 809 (7th Cir. 2014). A federal prisoner may challenge the legality of his detention under § 2241 if he falls within the "savings clause" of § 2255. See 28 U.S.C. § 2255(e); *Hill v. Welinger*, 695 F.3d 644 (7th Cir. 2012). Thus, through the § 2255 "savings clause" vehicle, a petitioner may seek habeas relief under § 2241 where he can show that § 2255 provides an "inadequate or ineffective" means for challenging the legality of his detention. See *Sanchez-Rengifo v. Caraway*. 798 F.3d 532 (7th Cir. 2015).

JURISDICTIONAL POSTURE OF THIS PETITION

The Western District of Michigan convicted Eric Welch of possessing 16 images of "unallocated space" (blocked internet content) child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B) and sentenced him to 168 months' imprisonment. The court enhanced his sentencing range under statute [18 U.S.C. § 2252A(b)(2) (from 0 – to – 10 years, to 10 – to – 20 years)], based on the use of a prior 2000 conviction in Michigan for Attempted Misdemeanor Fourth-Degree Criminal Sexual Conduct. [*United States v. Welch*, U.S. D.C. W.D. Mich, 2:10-cr-0008-RAED (hereafter "Crim.") R.59, Jmt.]. The Sixth Circuit dismissed Mr. Welch's direct appeal pursuant to *Anders v. California*, 386 U.S. 738 (1967) after his appellate counsel – who was the same as his trial counsel –

could not find any issues on appeal. *United States v. Welch*, No. 10-2677 (6th Cir. Oct. 20, 2011). Mr. Welch timely filed a petition for *certiorari*, which was denied on May 5, 2012. [Crim. R. 88, Denial of Cert.].

On April 8, 2013, Mr. Welch filed a *pro se* motion under 28 U.S.C. § 2255 seeking collateral review of his sentence. The district court denied that motion and entered judgment on January 30, 2014. [*Welch v. United States*, U.S. D.C. W.D. Mich., No. 2:13-cv-115, R. 41, Jmt.]. On February 26, 2014, now with the benefit of counsel, Mr. Welch filed a motion under Fed. R. Civ. Pro. 59(e) and 60(b), seeking to vacate the judgment. [R. 43, Mot. To Vacate]. On August 27, 2014, the district court denied the motion and denied a certificate of appealability on all issues. [R. 47, Mem. Op.]. Mr. Welch filed a notice of appeal on October 3, 2014. [R. 48, Notice of Appeal]. The Sixth Circuit filed its decision also denying a COA on March 27, 2015. [*Welch v. United States*, Sixth Circuit No. 14-2286]. Mr. Welch timely filed a petition for rehearing, which the Sixth Circuit denied on June 15, 2015. [*Id.*]. In sum, over two years after the district-court denial of his first 2255, the Supreme Court decided *Mathis*.

Mr. Welch is currently housed at U.S. Penitentiary in Marion, Illinois. A petition for habeas corpus under 28 U.S.C. § 2241 must be filed in the district of confinement. See *Kholyavskiy v. Achim*, 443 F.3d 946 (7th Cir. 2006). This Court has jurisdiction to hear a habeas corpus petition under 28 U.S.C. § 2241 because it is the closest U.S. District Court to where Petitioner is incarcerated.

This Circuit recently announced *Mathis* is available retroactively to cases on collateral review. See *Holt v. United States*, 843 F.3d 720 (7th Cir. Nov. 2016) ("Substantive [statutory interpretation] decisions such as *Mathis* presumptively apply retroactively on collateral review.") (citing *Davis v. United States*, 417 U.S. 333 (1974); *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016). *Holt* also reported that "the United States has conceded that [*Mathis* and *Haney*] do" apply retroactively on collateral review.) 543 F.3d at 721-722.

In addition, this Circuit's case law notes that *Mathis* claims "must be brought, if at all, in a petition under 28 U.S.C. § 2241." *Box v. United States*, No. 16-2546 (7th Cir. July 20, 2016) (citing *Dawkins v. United States*, 829 F.3d 549 (7th Cir. 2016); *Brown v. Caraway*, 719 F.3d 583 (7th Cir. 2013); *In re Davenport*, 147 F.3d 605, 611-12 (7th Cir. 1998).)

III Facts

In brief, Mr. Welch never "re-offended" to come to federal prison in 2010. The truth is that at least one Michigan officer violated Petitioner's plea agreement in the State court, and re-prosecuted him (in the federal system), for the known conduct. (Mr. Welch had accepted responsibility for his behavior, admitted guilt, and completely served his time.) But, after three years of leading an exemplary life, the government rewarded his rehabilitation efforts with an indictment. The back-story goes like this:

In 2007, Michigan State Police ("MSP") seized Mr. Welch's hard drive in a state criminal investigation, which was coded with Incident Number 090-0000577-07. [*Welch v. United States*, U.S. D.C. W.D. Mich, No. 2:13-cv-115, R. 4-1, incident report, at ID#157]. That investigation was closed once he pleaded guilty, in 2007, to "accosting a minor for immoral purposes," Mich. Comp. L. § 750.145a (an actual adult prostitute working for the MSP offered a fictitious 14 y.o. prostitute for hire); and *nolo contendre* to engaging in prohibited conduct with a telecommunications device, Mich. Comp. L. § 750.540c.

Counsel (now Judge) Mark Wisti represented Plaintiff, and the transcript summarizes the facts as follows:

> THE COURT: Thank you, Mr. Strome. Mr. Wisti?
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> MR. WISTI: I will – I think the phrase hunting on the internet for young girls miscategorizes the facts of this case dramatically, Your Honor. Ah, what occurred here is that the Michigan State Police used a prostitute to contact Mr. Welch and advise him that she had a thirteen year old girl available to have sex with him – fourteen year old girl to have sex with him, and Mr. Welch, and I don't condone his behavior at all, Your Honor, bit on that hook, line and sinker. But this is not a case where he was out preying on the Internet and approached someone at random, but was in fact picked out by the police and this prostitute.

[*People v. Welch*, Houghton County Circuit Court, File No. 07-2225-FH, 2007, Sentencing Transcript at 27, August 31, 2007].

As part of the plea deal, the State (1) agreed not to pursue any charges over alleged child pornography on his hard drive and (2) agreed that it would not refer Mr. Welch for federal prosecution, either. [*Id.* R. 4-2 of ECF No. 1-1, Judge Wisti Affidavit, at ID#197, ¶¶ 3-4].

The MSP destroyed Mr. Welch's hard drive. [R. 26, Gov't Ans., at ID#398]. But it somehow preserved an unsanctioned copy of the drive, in violation of its evidence retention policy. *See* [*Id.* R. 4-3, Evid. Policy, at ID#238-40].

In 2008, in violation of Mr. Welch's plea agreement, MSP Detective Sergeant Tom Rajala reported Mr. Welch to ICE Special Agent Miller, [*United States v. Welch*, U.S. D.C. W.D. Mich, 2:10-cr-8, Tr. Vol. I at ID#928]. The MSP had retained what it claimed was a copy of a drive (reported destroyed months prior), which it also turned over to ICE. [*See id.* at ID#955]. Unbeknownst to anyone at trial, the property receipt documenting the transfer of the hard drive to ICE was generated in connection with "Incident Number 86-577-08," the incident number for an investigation into a sex offender named Steven Gilbert Schwechel. [*Id.*, R. 42-1, Receipt, at ID#576]. (A totally unrelated defendant and case.)

Mr. Welch was indicted for knowingly possessing child pornography. 18 U.S.C. § 2252A(a)(5)(B), and was convicted after a jury trial. [Crim. R. 43, Verdict]. Attorney Mark L. Dobias represented Mr. Welch at trial. Unbeknownst to Mr. Welch, the Government had previously conceded to Mr. Dobias and the court that if Mr. Welch took the stand in his own defense, the outcome would be "dispositive." [Crim. R. 33 at ID#85]. After losing to a petite jury, Mr. Welch learned about and then tried to alert the district court that Mr. Dobias had prevented him from testifying at his own trial [*Welch v. Dobias*, U.S. D.C. W.D. Mich, Civil Action No.: 2:17-cv-00038-GJQ-TPG (2017)]. (Mr. Dobias had misinformed Mr. Welch that there would be an "automatic mistrial" if he testified, and afterward Mr. Dobias apparently interfered with Mr. Welch's confused and frustrated filings by ordering him to "stop writing" the court.) *Id.*

Based on, and in addition to the Ground of this Petition, the PSR requires re-drafting because it currently reflects improperly enhanced guidelines and conditions of supervised release. Other reasons exist for correcting his sentence, see *Adkins v. United States*; 743 F.3d 176 (7th Cir. 2013) (Special conditions of supervised release prohibiting viewing or listening to any pornography or sexually stimulating material or sexually oriented material or patronize locations where such material is available" is unconstitutional and overbroad.) At bar, this Petition fully adopts as if set forth here, a new (and forthcoming) sentence memorandum and argument. *See also, Packingham v. North Carolina*, U.S. No. 15-1194 (SCOTUS oral arguments 2/27/2017.)[1]

IV. Writs of Habeas Corpus Under 28 U.S.C. § 2241

A writ of habeas corpus filed under § 2241 and a motion to vacate, set aside, or correct a sentence filed under 28 U.S.C. § 2255 are "distinct mechanisms for seeking post-conviction relief." *Rosch v. United States*, 89 F.3d 839 (7th Cir. 1996). Section 2255 provides the primary means of collaterally attacking a federal conviction and sentence. See *Suggs v. United States*, 705 F.3d 279 (7th Cir. 2013). Section 2241 is generally used to attack the manner in which a sentence is executed. See *United States v. Stokes*, 726 F.3d 880 (7th Cir. 2013).

A federal prisoner may attack the validity of his conviction in a § 2241 petition if he can meet the requirements of § 2255(e)'s savings clause. See *Hill,* 695 F.3d 644 (7th Cir. 2012). The prisoner bears the burden of showing that the remedy under § 2255 would be "inadequate or ineffective to test the legality of his detention." See 28 U.S.C. § 2255(e); *Muse v. Daniels*, 815 F.3d 265 (7th Cir. 2016). A prisoner who wishes to proceed under the savings clause must establish that his claim is based on a retroactively applicable Supreme Court decision which establishes that the petition may have been convicted of a "nonexistent offense" and that the claim "was foreclosed by circuit law at the time when the claim should have been raised."

In order to prevail, Petitioner must prove his aggravated conviction increased his sentence to a minimum above what it would have been without the aggravated sentence.

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[1] "*Questionable [DOJ] Statistic Pervades High Court Sex Offender Cases*," Exhibit BNA Criminal Law Reporter, Vol. 100, NO. 22 at 486-488

In considering what it means to be "inadequate or ineffective to test the legality of his detention," the petition must adhere to the principles of the Seventh Circuit: "only if he had no reasonable opportunity to obtain earlier judicial correction of a fundamental defect in his conviction or sentence *because the law changed* after his first 2255 motion." *In re Davenport*, 147 F.3d 605, 611 (7th Cir. 1998) (emphasis added). To proceed, three additional conditions must also be met: (1) the petition relies on a new statutory interpretation case rather than a constitutional case; (2) the petitioner relies on a decision that he could not have invoked in his first § 2255 motion (like at bar) and that applies retroactively; and (3) there has been a "fundamental defect" in his conviction or sentence that is grave enough to be deemed a miscarriage of justice. [*Id.* at 611-12]; *Brown v. Caraway* 719 F.3d at 586; see also *Brown v. Rios*, 696 F.3d 638, 640 (7th Cir. 2012).

The Government agrees that § 2241 is available to a petitioner who shows "a fundamental error in the criminal proceedings," meaning that he does not have to prove his "actual innocence." See *Persaud v. United States*, 134 S.Ct. 1023 (2014), December 20, 2013, Brief of the Solicitor General. The Solicitor General argued that the Fourth Circuit in *In re Jones*, 226 F.3d 328, 333-334 (4th Cir. 2000) "had no occasion to consider the availability of savings-clause relief for any other type of challenge, and *the lower courts erred in interpreting that decision to limit savings-clause relief to situations in which the defendant's claim is that he was convicted for non-criminal conduct.*" (Emphasis in the original). *Id.*

The Solicitor General then persuasively argued that there was no legitimate distinction between challenges to convictions and sentences and that the limited construction given to § 2241 was not supported by the language of § 2255 or

Congressional intent. *Id* at 9. Thus, courts had "erred in concluding that the savings clause does not permit petitioner to seek relief under Section 2241 purely because he challenges his sentence rather than his conviction.

CHALLENGING SENTENCE ENHANCEMENTS UNDER *MATHIS*

Mathis-based habeas petitions are not *only* reserved for statutory "mandatory minimum" sentences (like ACCA), but also are used to challenge career offender sentences, immigration proceedings, and sex offender (statutory and guideline) enhancements as well.

For example, in *United States v. Dahl,* 833 F.3d 345 (3rd Cir. 2016), a defendant's prior Delaware convictions that were related to sexual activity with minors were not categorically "sex offense convictions" (not predicate offenses) because the State defines "sexual contact" broader[2] than the federal statute enhancing sentences for prior state "convictions" for "sexual contact." (18 U.S.C. § 2241, citing to 2243(a), for the narrower "sexual contact" definition.). The 3rd Circuit reversed Mr. Dahl's statutory enhancement because the categorical approach – under *Mathis* – determined that defendant's State convictions (despite their previous blanket "severity" treatment) did not constitute convictions for federal enhancement purposes.

Another example is *Kirk v. United States*, U.S. D.C. N.D. Miss. No. 4:05-cr-52 (November 1, 2016), where the elements of the Georgia crime of child molestation are no longer a "violent felony" under the "elements" clause of § 924(e)(2)(B)(i); nor is it an enumerated offense under § 924(e)(2)(B)(ii).) (§ 2255, applying the holding in *Mathis*.)

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[2] E.g. "over the clothing" in the *actus rea* element, and "reasonable person" standard in the *mens rea* element. *Dahl, passim.*

In the same vein, *Sandoval v. Yates*, 2017 WL 382335 (9th Cir. 2017) noted that "delivery" of a controlled substance under Oregon Revised Statutes 475.992(1)(a), is no longer a "controlled substance offense" under *Mathis* because Oregon's statute includes an "offer to sell," and selling drugs is not covered by the federal Controlled Substances Act); See also *United States v. Velasquez*, 2016 WL 4148316 (E.D. N.Y. 2016) (first degree New York burglary conviction under new York Penal Law 140.30 not a "crime of violence" for career offender purposes in light of *Mathis*. Relief granted under 2255); See also *United States v. Smith*, 2016 WL 4480072 (W.D. Penn. 2016) (Pennsylvania simple assault conviction under 18 Pa.C.S.A.2701(a)(1) no longer qualifying for career offender purposes in light of *Mathis*; relief granted under 2255); See also *Chang-Cruz v. Attorney General*, 2016 WL 4446063 (3rd Cir. 2016) (vacating and remanding BIA denial of request for cancellation of removal where defendant was previously convicted under New Jersey Stat. Ann. 2C:35-7(a) for possessing or distributing drugs within 1,000 feet of school zone. The court found the state conviction broader than the generic federal offense in light of *Mathis*);

V. *Mathis v. United States*

Two and a half years after the district court denied Mr. Welch's 2255 (in January of 2014), the United States Supreme Court decided *Mathis* (June of 2016). The Court set forth *how* a lower federal court determines whether a state statue is divisible, and therefore whether, in employing the modified categorical approach, documents pertaining to the prior conviction may be used to ascertain if that conviction comes within a federal definition of an offense or has the elements of an enumerated offense.

The Supreme Court held that a state statute that provides alternative *means* for committing an element of a crime – that are broader than the elements of the generic crime – is not a predicate offense to trigger an aggravated sentencing enhancement.

A. THREE-PART PURPOSE OF A CONVICTION'S "ELEMENTS-ONLY" INQUIRY

"This Court's cases establish three basic reasons for adhering to an elements-only inquiry. First, [the enhancement statute's] text[3], which asks only about a defendant's 'prior convictions,' indicates that Congress meant for the sentencing judge to ask only whether 'the defendant had been convicted of crimes falling within certain categories,' not what he had done. Second, construing [the enhancement statute] to allow a sentencing judge to go any further would raise serious Sixth Amendment concerns because only a jury, not a judge, may find facts that increase the maximum penalty. And third, an elements-focus avoids unfairness to defendants, who otherwise might be sentenced based on statements of 'non-elemental fact[s]' that are prone to error because their proof is unnecessary to a conviction." *Mathis* at 2246. (Citations omitted).

B. TERMS

"'Elements' are the 'constituent parts' of a crime's legal definition – the things the 'prosecution must prove to sustain a conviction.' *Black's Law Dictionary* 634 (10th ed. 2014). At trial, they are what the jury must find beyond a reasonable doubt to convict the defendant, and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty." *Id.* at 2248.

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[3] For purposes of this Petition, and as already set forth in the citations above, most courts nowadays are using *Mathis* for other types of sentencing enhancements in addition to ACCA, whether statutory, or guideline-based.

"'Facts', by contrast, are mere real-world things – extraneous to the crime's legal requirements. They are circumstances or events *within* the requisite element. See generally, *Mathis*, citing to *Schad v. Arizona*, 501 U.S. 624, 636 (1991) (plurality opinion: "[L]egislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes"). As shown below, Michigan case law and legislative history take the same approach with misdemeanor fourth-degree CSC (the lowest possible conviction within the punishment ranges of CSC statutes in Michigan.)

VI. Whether Petitioner May Utilize the "Savings Clause" of § 2255(e) Depends On If *Mathis* Is Retroactive. The Seventh Circuit Says Yes.

Mathis is a case of statutory interpretation. *Dawkins v. United States*, 829 F.3d 549 (7th Cir. 2016). Like *Begay v. United States*, 553 U.S. 137 (2008), *Chambers v. United States*, 555 U.S. 122 (2009), and *Descamps v. United States*, 133 S.Ct. 2276 (2013), *Mathis* was a substantive holding which limited the type of prior convictions (Iowa burglary statute in that case) that can be classified as "violent felonies" under ACCA. See, *Narvaez v. United States*, 674 F.3d 621, 624 (7th Cir. 2011). Thus, as in those cases, the Department of Justice (as directed by the Attorney General in nation-wide formal guidance to federal prosecutors) has conceded that *Mathis* applies retroactively to cases on collateral review.

Mathis is a substantive rule that applies retroactively. See *Holt v. United States*, 843 F.3d 720 (7th Cir. Nov. 2016). Under *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion), "[n]ew substantive rules generally apply retroactively," but "[n]ew rules of procedure…generally do not apply retroactively." *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004). *Descamps* was substantive in that it excludes certain burglaries from the enumerated offenses clause of the ACCA and will bar other convictions obtained under overbroad indivisible statutes, or variants, from satisfying the ACCA's definitional clause through application of the modified categorical approach.

The 7th Circuit has reasoned and held that if *one* element of the statute of conviction is broader than an element of the predicate crime listed in the aggravated statute (at bar, Michigan misdemeanor "sexual contact" being broader than federal "abusive" 18 U.S.C. §2252A(b)(2) sexual acts), the Court can't resort to extraneous documents to determine whether the facts of the case show that the state crime should count as a predicate under the Guidelines. *Dawkins*, 829 F.3d 549 at 550. Further, that any such claim under *Mathis* can be brought "only under § 2241." [*Id.*]

As argued below, Petitioner's prior state conviction pursuant to Michigan Statute for "sexual contact," (attempted fourth-degree CSC), defines "sexual contact" more broadly than federal law. Petitioner is suffering a miscarriage of justice for a 10-year, statutory mandatory minimum sentence, aggravating guidelines factors, and special terms of supervised release based on this fundamental error. This is why Petitioner requests relief and re-sentencing under § 2241.

VII. Argument

A. "THE THRESHOLD INQUIRY – DIVISIBLE, OR INDIVISIBLE, UNDER THE NEW MATHIS RULE?"

This is easy in this case. Discussed below, the Michigan Model Jury Instructions (Exhibit) and the Michigan Supreme Court cases interpreting them, list various "circumstances" to fulfill each element of Criminal Sexual Conduct in the Fourth Degree (MCL 750.540e). The conviction has only one penalty, and is not necessarily an "included offense" of another[4]. Another point is that the *mens rea*, *actus rea* and causation elements include state-defined "means" which other federal courts have found overboard, looking at similarly worded state statutes. The short answer to the question "is it a means or an element?" is answered this way: A different conviction, or a different penalty, make it *divisible*. But by contrast, multiple ways to receive the same conviction, and the same penalty make it *indivisible*.

As *Mathis* makes clear, "the statute on its face may resolve the issue. If statutory alternatives carry different punishments, then under *Apprendi* they must be elements." *Mathis* at 2256. The Court went on to emphasize the difference between a jury having to "agree on any circumstance increasing a statutory penalty," and if a statutory list is drafted to offer "illustrative examples," then it includes only a crime's *means* of commission." *Id.* Even if one element qualifies for a factual inquiry (none do), "the categorical approach continues to apply to the rest of the statute's non-qualifying elements." *Dahl*, 833 F.3d at 351.

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[4] Fourth-degree CSC "is not necessarily an included offense of [another] degree CSC." *People v. Ramirez*, No. 217841, 2001 WL 824450 (2001), citing to, and relying on, *People v. Norman*, 184 Mich. App. 255 (1990).

B. UNDER *MATHIS*, THE MICHIGAN FOURTH-DEGREE CSC STATUTE IS NOT DIVISIBLE

The "elements of a crime" are "the constituent parts of a crime – usually consisting of the *actus rea*, *mens rea*, and causation – that the prosecution must prove to sustain a conviction." [*Black's Law Dictionary*, 9th Ed. 2009]. And here, MCL 750.540e[5] is no different. In fact, the Michigan Legislature has *already* "disjunctively" divided up the **convictions** into different degrees (First Degree, Second Degree, Third Degree, Fourth Degree), each corresponding to an indivisible conviction and each with ever-increasing **penalties**:

Criminal Sexual Conduct in the Fourth Degree Model Jury Instructions

(1) The defendant is charged with the crime of fourth-degree criminal sexual conduct. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant intentionally [touched (*name complainant*)'s / made (*name complainant*) touch (his / her)] [genital area / groin / inner thigh / buttock / (or) breast] or the clothing covering that area.

(3) Second, that this touching was done for sexual purposes or could reasonably be construed as having been done for sexual purposes.

(4) [*Follow this instruction with* {[causation circumstances]} *as warranted by the evidence.*]

(Michigan Model Criminal Jury Instructions Chapter 20, M Crim J1 20.13) (*See* Exhibit). The Statute appears in its raw form without requisite definitions on pages 25-26 of this Petition.

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[5] Mr. Welch has included an Exhibit copy of his docket sheet ("Register of Actions" in Michigan), with his conviction revealed. A good point to raise is that after the detective and the victim's family conferred together with the Prosecutor and Counsel, the objective facts-to-elements needed to reflect 4th Degree CSC, not 3rd degree CSC. This served that obvious function, as well as preserved the innocence and dignity of the victim.

Like most crimes, a conviction for fourth-degree CSC requires three elements (*actus rea*, *mens rea*, and causation). When all three elements of a crime are required, in law they are also known collectively as a *copulative condition*, that is, they "require[] the performance of more than one act" (especially *actus rea* and causation) (*Blacks*). By necessitating the performance of all three conditions, the elements of fourth-degree CSC are not *disjunctive conditions* (a condition requiring the performance of one of several acts which increase punishment), but rather contain disjunctive *allegations*[6] sufficient to fulfill any one element. So, fourth-degree CSC, with its fixed punishment, non-abusive sexual contact, and alternative means of satisfying each element, is *indivisible.*

The first element in the jury instruction is the *actus rea*, or the act of touching intimate parts directly on the skin, **or the clothing** covering that area. The second element is the *mens rea*, which includes not just "for sexual purpose" but may also be found **by "reasonably" construing it** as having been done for such a purpose. The two elements in the jury instructions are simply a spelled-out version of Michigan's definition of "sexual contact."

The last element is causation, which the statute itself calls and "circumstances" listed (i.e. disjunctive *allegations*, not disjunctive conditions). The statute and the high court in Michigan call circumstances "aggravating circumstances" (disjunctive conditions for a higher conviction) when they raise the level of severity from fourth, to second-degree (i.e. "sexual contact" to "abusive sexual contact"), and from third to first-degree ("sexual act" to an [abusive] "personal injury" sexual act). See, *People v. Petrella*, 424

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[6] A *disjunctive allegation* (as opposed to a disjunctive condition), is a statement "that expresses something in the alternative, [usually] with the conjunction "or." *Black's* at 87 (9th Ed. 2009). Such as a knife, or a gun, or a monkey wrench, being a "deadly weapon."

Mich. 221 (1985) (holding the statutory scheme that permits elevation of a criminal sexual conduct offense from a lesser to a higher degree, upon the basis of proof of personal injury [in the form of mental anguish, in that case], offends neither the United States nor the Michigan Constitutions.)

The Jury Instructions demonstrate that *Petrella* is the Model interpretive authority for Michigan courts, not *Ramirez* (as relied upon by a district court in *Vanbuhler v. United States*, U.S. D.C. E.D. Mich. Civil No. 14-11822 (July 27, 2016).) The reasoning concerning the difference between mere "circumstances" within a degree and "aggravating circumstances" elevating punishment to a different conviction, is found in *Petrella* at 239-242 and fn*10). *Petrella* lists the following punishments and aggravating circumstances:

> **First-degree CSC**: The "actor" must have engaged in sexual penetration with another person, accomplished by one of seven *aggravating* circumstances. "Personal injury" ([abuse]) elevates the offense of third-degree CSC to first-degree CSC. First-degree is a felony punishable by imprisonment for life or for any term of years. MCL 750.520b(2). *Id.* at 239. (Emphasis added).
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> **Second-degree CSC**: When an actor engages in sexual contact with the victim, accomplished through the use of force or coercion, and causes personal injury [is abusive in nature] to the victim, the actor is guilty of second-degree CSC. Second-degree CSC is a felony punishable by imprisonment for not more than fifteen years. MCL 750.520c(2). *Id.* at fn*10
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> **Third-degree CSC** : The "actor" must have engaged in sexual penetration with another person, accomplished through the use of force or coercion, but without necessitating a circumstance that caused "personal injury." Third-degree CSC is a felony punishable by imprisonment for not more than fifteen years. MCL 750.520d(2). *Id.* at 239
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> **Fourth-degree CSC**: Sexual contact accomplished either 'consensually' with a 13-15 year-old teen, or through the use of force or coercion, but

> *without* the aggravating circumstance of personal injury [i.e. abuse], would result in a conviction of fourth-degree CSC, a misdemeanor "punishable by imprisonment for not more than 2 years,…" MCL 750.520e. *Id.* at fn*10. (Emphasis added).

To illustrate, if Mr. Welch had offered only that he had been convicted of "Criminal Sexual Conduct" in Michigan, and played fast and loose with the head-spinning conduct of all four statutory ranges, then the Modified Categorical Approach and *Shepard* documents would be appropriate in auguring what conviction he has. But not here. Here, Mr. Welch offers the record, the Michigan Legislature, State law, and *Mathis*, in a clearly categorical legal lens focused squarely on his prior conviction under MCL § 750.520e.

C. SAME PENALTY FOR DIFFERENT BEHAVIORS

None of the "circumstances" listed in the causation element for Fourth Degree CSC increase the **penalty**, and are therefore "means" of committing it. Michigan's high court has held the same. See *People v. Adamowski*, 340 Mich. 422, 429 (1954) (holding that courts should not, without clear and cogent reason, give a statute a construction the Legislature plainly refused to give. The *Petrella* court observed from *Adamowski* that "(1) not all third-degree CSC involves mental anguish, e.g., 'consensual' sexual intercourse with a person who is at least 13 years of age and under 16 of age, and (2) prosecutorial discretion with regard to the crime charged [First-degree, Second-degree, Third-degree, Fourth-degree] arising out of the same conduct has withstood constitutional attack, e.g., larceny in a building versus shoplifting." (*Petrella*, 424 Mich. At 243, citing to *People v. Baker #2*, 103 Mich.App. 704 at 709-710 (1981), *lv den* 417 Mich. 1093 (1983).)

And likewise, the first two Michigan jury instructions (the *actus rea* and *mens rea* elements of "sexual contact") contain terms (explained below) that are broader than how federal courts consider "the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." 28 U.S.C. § 2252A(b). And none of those terms increase the penalty in a Michigan conviction for § 750.520e.

"Courts must ask whether the crime of conviction is the same as, or narrower than the relevant generic offense. They may not ask whether the defendant's conduct – his particular means of committing the crime – falls within the generic definition. And that rule does not change when a statute happens to list possible alternative means of commission." *Id.* at 2257. *See also, United States v. Osborne*, 551 F.3d 718, 721-22 (7th Cir. 2009).

Thankfully, since Mr. Welch offers proof of his conviction under fourth-degree CSC, the measure of "elements increasing punishment" is as unnecessary as the Modified Categorical Approach. He's "locked-in", so to speak, under *Mathis*, to an indivisible statute. The categorical approach's principles are furthered by this reading: A divisible criminal structure into degrees does not cause infinite divisibility within any one degree so defined. Any analysis like that would on the one hand resemble teasing out meaningless abstractions, and on the other hand violate the Sixth Amendment's "judge vs. jury" fact-finding.

In Michigan, whether an actor touched (over the clothing), a woman, or a 14-year-old's buttocks by first insinuating he would raise her grandmother's rent if not allowed to do so, or was (more broadly) "reasonably construed" to do so by a bystander; or in an alternate scenario, had the teen had 'consensual' contact under either circumstance, both the conviction, and the 0-to-2-year punishment range, would never change. This illustration shows some of the many *means* of gaining one conviction, one punishment range of fourth-degree CSC.

Because "legislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes," the means within each element of § 750.520e merely specifies diverse manners of satisfying a single element of a single crime. Otherwise said, factual circumstances permit various ways of committing some component of the offense. "A jury could convict even if some jurors 'conclude[d] that the defendant used a knife' while others 'conclude[d] he used a gun,' so long as all agreed that the defendant used a 'deadly weapon.'" *Id.*

D. ONE CONVICTION, INDIVISIBLE

In the past, Michigan's fourth degree criminal sexual conduct statute has been called a "divisible statute." *United States v. Ferguson*, 681 F.3d 826, 835 (6th Cir. 2012), for the simple reason that there are "any" number of ways to "sexual[ly] contact" someone age 13 and higher. *Id.* For the reasons herein, that conclusion's fallacy lumps any number of *factual* circumstances (*actus rea*, *mens rea* and causation elements) into the same category as "aggravating circumstances that increase liability." And under *Mathis*, Michigan's fourth-degree criminal sexual conduct is no longer a divisible statute.

Relevant to this Petition, Mr. Welch filed a supplemental ground for relief in his 2255 under *Descamps*:

"Under the New Rule in *Descamps*, Petitioner May Be Actually Innocent of the Conditions Required to Trigger a 10-year Mandatory Minimum." [*Welch v. United States*, U.S. D.C. W.D. Mich. No. 2:13-cv-115, Doc. #17-18].

But, enhancements like those at bar, which passed muster under *Descamps*, now fail under *Mathis*. The district court denied that prior ground – prior to *Mathis* – by relying on the now out-dated conclusion that Michigan's Attempted Fourth Degree Criminal Sexual Conduct Statute was "divisible" under the Sixth Circuit law of *Ferguson*.

The opinion in *Dahl* is helpful here (see page 9 of this Petition.) Like Delaware's statute in *Dahl*, comparing the Michigan statute to the federal statute at bar, we should determine that Michigan fourth-degree CSC unlawful sexual contact is broader than federal aggravated sexual abuse in at least three ways; and therefore, Mr. Welch's prior offense under that statute does not qualify as a prior "conviction" under 18 U.S.C. § 2252A(b)(2).

On the federal side of things, the § 2252A(b)(2) statutory enhancement provides for a mandatory minimum sentence for those who have a prior conviction "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor." The Seventh Circuit utilizes 18 U.S.C. § 2241-43 to define "abusive." *See, Osborne*, 551 F.3d at 720-22:

"Given the lack of a definition in § 2252, we think it best to say that, as a matter of federal law, sexual behavior is 'abusive' only if it is similar to one of the crimes denominated as a form of 'abuse' elsewhere in Title 18. This is the approach the Supreme Court took in *Begay v. United States*, 128 S.Ct. 1851 (2008), to the definition of a 'violent felony' under 18 U.S.C. § 924(e)(2)(B)(ii). Cf. *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (*en banc*) ('sexual abuse of a minor' in immigration law means a state offense that would be a crime under § 2243)." *Id. See also, Gaiskov v. Holder,* 567 F.3d 832 at 838 (7th Cir. 2009) (Considering if 18 U.S.C. § 2252(b)'s use of a "prior conviction", it is "best to say that, as a matter of federal law, sexual behavior is 'abusive' only if it is similar to one of the crimes denominated as a form of 'abuse' elsewhere in Title 18.") (Petition denied for other reasons); *See also, United States v. Goodpasture*, 595 F.3d 670 at 672-673 (7th Cir. 2010) (Statutory enhancement does not apply because "kissing and fondling [are not] nearly as dangerous as drunk driving [or] sexual intercourse with a child.").

In addition to Sixth Amendment Constitutional reasons, the Seventh Circuit noted that the statutory scheme further supports the use of § 2241-43 to define "abuse." Thus, for all three reasons used to support any ground – Constitutional, Statutory, and Equity – only offering relief under *Mathis* to someone with a "violent felony" or "drug offense," but never doing so for the historically overbroad application of low-level sexual contact misdemeanors would be a "miscarriage of justice."

"Although neither § 2252 nor any other section of the Criminal Code defines the word 'abusive,' some other sections shed light on how Congress understood the word. Section 2241 covers 'aggravated sexual abuse'; § 2242 deals with "sexual abuse; § 2243 addresses 'sexual abuse of a minor or ward'. These are the same three terms that § 2252(b)(1) employs to denote state convictions that support a recidivist enhancement, and § 2252(b)(1) was added in 1990 at the same time that §§ 2241-43 were enacted, so these laws should be read together. "Section 2243 is most helpful for our purpose, as it covers the sexual abuse of a minor. Section 2243(a) makes it a crime to 'engage[] in a sexual act' with a person between the ages of 12 and 15 who is at least 4 years younger than the defendant." *Osborne*, 551 F.3d 720-22.

Notably, § 2252A(b) does not include (or criminalize) "abusive sexual *contact*". But, even if it did, the comparison to MCL §750.520e falls flat, anyway. *Osborne* shows how abusive sexual contact under federal law *limits* sexual contact to the sexual "act" clause.

Osborne continues: "[s]ection 2246(2) in turn defines "sexual act" to include intercourse, fellatio, cunnilingus, and touching the genitalia 'not through the clothing'. 'Sexual contact' is defined in § 2246(3) to include touching, directly or through clothing, 'the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.'" *Id.* But, § 2244, "abusive sexual contact" narrows "sexual contact" to "sexual acts" (i.e. not through the clothing, but skin-to-skin). And recall *Osborne* and *Estrada-Espinoza*'s "sexual abuse of a minor" in [federal] law means a state offense that would be a crime under § 2243." *Id.*

Section 2252A(b)(2)'s enhancement only punishes as a crime "sexual **conduct** in circumstances where sexual **acts** are punished by this chapter." (emphasis added). In other words, *abusive* sexual contact [§ 2244(a)(1 through 5)] each requires, in pertinent part, "[w]hoever,…knowingly engages in or causes **sexual contact** with or by another person, if to do so would violate [sub]section[s] of [2241 – 2243] of this title **had the sexual conduct been a sexual act**, shall be fined under this title, imprisoned [etc.]." To illustrate, § 2243(a) (Sexual Abuse of a Minor or Ward), requires, in relevant part:

> Whoever,…knowingly engages in a **sexual act** with another person who –
> (1) has attained the age of 12 years but has not attained the age of 16

> years; and (2) is at least four years younger than the person so engaging; or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both. (emphasis added).

Federal law does not call "abusive" all kinds of sexual contact. "[It's] hard to classify as 'abusive' [sexual contact with another] given the treatment that term receives in Chapter 109A of the Criminal Code (18 U.S.C. §§ 2241-48, and titled 'Sexual Abuse')." *Id.*

E. THE CONVICTION, NOT THE CONDUCT

In *Mathis*, the Court emphasized that a sentencing enhancement's use of the phrase "conviction" indicates Congress's intent to apply the categorical approach. 136 S.Ct. at 2252 ("By enhancing the sentence of a defendant who has [] 'previous convictions'...rather than one who has [previously] committed that crime – Congress indicated that the sentencer should ask only about whether 'the defendant had been convicted of crimes falling within certain categories,' and not about what the defendant had actually done." (quoting *Taylor v. United States*, 495 U.S. 575 at 600 (1990). Further, even if a factual inquiry into the offense is pushed by the Government, *contra Nijhawayn v. Holder*, 523 F.3d 387 (3rd Cir. 2008), *aff'd*, *Nijhawan v. Holder*, 557 U.S. 29 (2009), the factual inquiry triggered by qualifying language is limited to the facts relevant to the qualification itself. The categorical approach continues to apply to the rest of the statute's non-qualifying elements. Congress clearly intended to use the categorical approach. *Dahl*, 833 F.3d at 351.

At bar, enhancement statute 2252A(b)(2) requires, in pertinent part:

> [I]f such person has a prior **conviction** under this chapter, chapter 71, chapter 109A, or chapter 117,...or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor...such person shall be fined under this title and

imprisoned for not less than 10 years nor more than 20 years. (Emphasis added)

By comparison of both 2244(a)(3) ("sexual contact…had the **sexual contact** been a sexual act"), and 2252A(b)(2)'s "sexual conduct", *with* MCL § 750.520e, at least two broader means of satisfying the element of "sexual contact" fairly leap out:

> [T]he intentional touching of the victim's or actor's intimate parts **or the intentional touching of the clothing** covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can **reasonably be construed** as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for: (i) Revenge. (ii) To inflict humiliation. (iii) Out of anger. Mich. Comp. Laws § 750.520a(l) (2000).
> (Emphasis Added)

Thus, the Michigan definition of "sexual contact" is essentially consonant with the narrower federal definition, with at least two non-abusive means of (1) *touching of the clothing* in the *actus rea* element (is broader than the federal focus on abusive sexual acts), and (2) the *reasonably be construed* standard in the *mens rea* element. [Compare MCL § 750.520a(l) (2000) (broad, non-abusive "sexual contact"), *with* the narrower 18 U.S.C. § 2244 ("had the sexual contact been a sexual act").

THE TEXT OF MICHIGAN'S FOURTH-DEGREE CSC

1. A person is guilty of criminal sexual conduct in the fourth degree if he or she engages in **sexual contact**[7] with another person and if **any** of the following **circumstances** exist:

a. That other person is at least 13 years of age but less than 16 years of age, and the actor is 5 or more years older than that other person.

b. Force or coercion is used to accomplish the sexual contact. Force or coercion includes, but is not limited to, **any** of the following **circumstances**:

---

[7] The first two elements of the jury instructions (page 15 of this Petition), appearing here in §750.520e(1) are – even by themselves – broader than the federal definition, as discussed above.

i. When the actor overcomes the victim through the actual application of physical force or physical violence.

ii. When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute that threat.

iii. When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute that threat. As used in this subparagraph, "to retaliate" includes threats of physical punishment, kidnapping, or extortion[8].

iv. When the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable.

v. When the actor achieves the sexual contact through concealment or by the element of surprise.

c. The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

d. That other person is related to the actor by blood or affinity to the third degree and the sexual contact occurs under circumstances not otherwise prohibited by this chapter. It is an affirmative defense to a prosecution under this subdivision that the other person was in a position of authority over the defendant and used this authority to coerce the defendant to violate this subdivision. The defendant has the burden of proving this defense by a preponderance of the evidence. This subdivision does not apply if both persons are lawfully married to each other at the time of the alleged violation.

e. The actor is a mental health professional and the sexual contact occurs during or within 2 years after the period in which the victim is his or her client or patient and not his or her spouse. The consent of the victim is not a defense to a prosecution under this subdivision. A prosecution under this subsection shall not be used as evidence that the victim is mentally incompetent.

f. That other person is at least 16 years of age but less than 18 years of age and a student at a public or nonpublic school, and the actor is a teacher, substitute teacher, or administrator of that public or nonpublic school. This subdivision does not apply if the other person is emancipated or if both persons are lawfully married to each other at the time of the alleged violation.

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[8] Extortion is broader, because the term is no-where to be found in the federal definitions in § 2241, *et seq.*, either.

2. Criminal sexual conduct in the fourth degree is a misdemeanor punishable by imprisonment for not more than 2 years or a fine of not more than $500.00, or both. Mich. Comp. Laws § 750.520e (2003).

F. Michigan Authority Consonant With a Mathis Finding of At Least Three Overbroad Indivisibilities

First, and most importantly, the Michigan legislature and case law interpret that statute and its jury instructions as prohibiting "sexual contact," whereas § 2252A(b)(2) prohibits "abusive sexual acts[s]." *Compare* Mich. Comp. Laws § 750.520a definitions (and § 750.520e), *with* §2241, *et seq*. (Exhibit). Under the version of Michigan's law in place in 2000, sexual contact included touching intimate parts and other specified areas through clothing. Be that as it may, federal law defines "sexual act" more narrowly, requiring penetration or actual skin-to-skin contact between various specified body parts. See 18 U.S.C. § 2246(2)(a)-(c) ("abusive sexual contact['s]" narrowing of "sexual contact" to "had the sexual contact been a sexual act".) And under federal law, the "intentional touching" of the genitalia of a person under sixteen years old is only a "sexual act" if it is skin-to-skin, i.e., "not through the clothing."

Federal law defines "sexual contact," but this term is not included within 18 U.S.C. §2241 (*See*, e.g. *Osborne*, adopting Chapter 109A for § 2252A(b) enhancement purposes). Nor is it correct to read "sexual contact" into the generic use of the term "contact" in the definition of "sexual act." *See Dahl*, 833 F.3d at 356 (citing *United States v. Hayward*, 359 F.3d 631, 641 (3rd Cir. 2004) (distinguishing a "sexual act," which requires skin-to-skin touching, from "sexual contact," for which "the touching could occur either directly or through the clothing," and finding the defendant "could only have been sentenced to *sexual contact,* and not *sexual abuse*," the latter of which requires a sexual act.)

Second, even if it were correct to read "sexual contact" into the language of the sexual acts described in 2252A(b) (it's not there), the scope of the federal definition is narrower than Michigan's definition. The federal definition limits criminal "sexual contact" to touching with the specific "intent to abuse, humiliate, harass, degrade, or arouse or gratify" a sexual desire. *See* 18 U.S.C. § 2246(3). By contrast, Michigan's definition balloons this specific intent requirement, criminalizing intentional touching "if that intentional touching can **reasonably be construed** as being for the purpose of sexual arousal." Mich. Comp. Laws § 750.520a(l) (2000). (Emphasis added). This **reasonably be construed** standard is broader than the federal law's intent requirement.

Third, at least one district court in Michigan has conceded the causation subdivisions of MCL § 750.520e(1)(b) as "means" under *Mathis*. *See, Vanbuhler v. United States*, U.S. D.C. E.D. Mich. Civil No. 14-11822 (July 27, 2016). With all due respect, however, Judge Lawson (or his clerk) in that case chose to either ignore, or inadvertently overlooked the *punishment* aspect as distinguishing the difference between an element and a means under a *Mathis* analysis. He never even mentions that.

What is more, the state-court cases relied upon in *Vanbuhler*, are not used or cited by the Michigan Model Jury Instructions. In *Ramirez*, there is no mention of "aggravating factors as discrete elements rather than examples of different 'means' of committing the offense." (*Vanbuhler* at 11, incorrectly citing *Ramirez*.) That citation from *Ramirez* actually refers to the court's opinion on peremptory challenges, and the prosecutor's (allegedly) improper vouching for the victim's credibility. In fact, "aggravating" (as relied upon by the *Vanbuhler* court) as a word, or synonym, never even appears in the *Ramirez* opinion (the Michigan Model Jury Instructions cite to *Petrella*, not *Ramirez*.) State law lobbies in favor of this Petition.

As a recap from earlier, "[F]irst, [the enhancement statute's] text, which asks only about a defendant's 'prior convictions,' indicates that Congress meant for the sentencing judge to ask only whether 'the defendant had been convicted of crimes falling within certain categories,' not what he had done. Second, construing [the enhancement statute's] to allow a sentencing judge to go any further would raise serious Sixth Amendment concerns because only a jury, not a judge, may find facts that increase the maximum penalty. And third, an elements-focus avoids unfairness to defendants, who otherwise might be sentenced based on statements of 'non-elemental fact[s]' that are prone to error because their proof is unnecessary to a conviction." *Mathis* at 2246. (Citations omitted).

VIII Conclusion

Under *Mathis*, this Court is respectfully asked to resolve whether the definition of "sexual contact" in Michigan is overbroad. The government may contend that there is no miscarriage of justice because the undisputed facts make clear that Mr. Welch engaged in conduct amounting to a federal sex offense. [9] Again, however, when determining whether a predicate offense qualifies under the statute §2252A(b)(2), or the Guidelines (e.g. Petitioner's inflated pattern of activity enhancement under § 2G2.2(b)(5)[10], or special terms of supervised release, *contra Atkins*), sentencing courts should not look to the underlying facts of the prior offense, but to its elements. *Descamps*, 133 S.Ct. at 2283.

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[9] "Why is the FBI So Obsessed With Sex?", *Reason* (ISSN 0048-6906) April 2017, Vol. 48, No. 11 Article at 26 "Sex and Kids" by Jacob Sullum (citations included.)

[10] *United States v. Chriswell*, 401 F.3d 459 (6th Cir. 2004) (undercover officers are neither "minors," nor are they "victims" for enhancement purposes. *See also, United States v. Mitchell*, 353 F.3d 552, 554 (7th Cir. 2003).

But in a turn of events from *Descamps*, the primary focus of the Supreme Court's decision in *Mathis* was how to determine whether a statute is "divisible" and therefore whether the modified categorical approach can be used to determine when a statute defines more than one offense, or which offense a defendant was convicted. *Mathis*, at 2247. The *Mathis* decision is controlling regarding the methodology of the modified categorical approach, and the Government must agree with its holdings, even if they auger a contrary position couched in exclusive pre-*Mathis* precedent of this Circuit or any other.

In the past, sentencing courts could reference record documents to accuse "abuse" in every "sexual contact" on which a defendant's conviction was based. *Mathis* makes clear that the Government's new burden may no longer (force courts to) do so in cases like those at bar. A contrary position to this Petition would turn the purpose of the categorical approach on its head.

The purpose and application of the categorical approach is straight forward and more fair in a *Mathis*-finding of MCL §750.520e as indivisible. The grant of this Petition will not violate settled law, but will more importantly serve to conform proper sex offense calculations to reason.

Wherefore, Petitioner prays that the Court find – in light of *Mathis* – that Petitioner's 10-year mandatory minimum aggravated sentence is a miscarriage of justice under 18 U.S.C. § 2252A(b)(2), because the Michigan conviction is broader (in at least three ways) than the federal statute punishing a prior state sex offense, and grant the following:

1. Correct his miscarriage of justice 10-year mandatory minimum sentence, and re-sentence him to a *Gall*[11]-qualifying 0 months imprisonment, and 2 years supervised release; correcting improper supervised release conditions, criminal history category, and offense level to be re-calculated as explained in the re-sentencing memorandum. (forthcoming, and fully adopted into this Petition as if fully set forth here.)

2. Provide other such relief as the Court deems appropriate.

Respectfully Submitted,

May 2, 2017
Date Executed

I swear and verify under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct. Further, that it has been filed this day under prison mailbox rule in the institution's internal mail system designed for legal mail, United States Postal Service first-class postage pre-paid.

/s/ Eric Welch

ERIC WELCH, *pro se*
10444-089
U.S. Penitentiary – Marion
P.O. Box 1000
Marion, IL 62959

[11] *Gall v. United States*, 128 S.Ct. 586 (2007); *See also, Kimbrough v. United States*, 128 S.Ct. 558 (2007).

United States District Court
Southern District of Illinois

ERIC WELCH, 10444-089 Petitioner, v. WILLIAM TRUE – WARDEN, U.S. Penitentiary – Marion, Respondent.	))))))))	Habeas No. ______________

Certificate of Service

I hereby certify that a copy of the foregoing was mailed via the institution's internal mail system designed for legal mail this day.

WILLIAM TRUE – WARDEN
U.S. Penitentiary – Marion
P.O. Box 2000
Marion, IL 62959

Respectfully Submitted,

May 2, 2017
Date Executed

I swear and verify under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct. Further, that it has been filed this day under prison mailbox rule in the institution's internal mail system designed for legal mail, United States Postal Service first-class postage pre-paid.

/s/ Eric Welch
ERIC WELCH, *pro se*
10444-089
U.S. Penitentiary – Marion
P.O. Box 1000
Marion, IL 62959

STATE OF MICHIGAN 65A JUDICIAL DISTRICT ORI190025J	REGISTER OF ACTIONS	CASE NO: 00-544 D01 FY X-REFERENCE #: CLSH14033 STATUS: CLSD 06/06/02

JUDGE OF RECORD:
JUDGE: WELLS,RICHARD D., P-22177

STATE OF MICHIGAN v

CTN: 190000049701
TCN:
SID:

WELCH/ERIC/DEXTER
1031 N. WASHINGTON
LANSING MI 48906

ENTRY DATE: 03/24/00
OFFENSE DATE: 03/04/00

VEHICLE TYPE: VPN:
DOB: 03/15/1970 SEX: M RACE: U DLN: CDL:
VEH YR: VEH MAKE: VIN: PAPER PLATE:

DEFENSE ATTORNEY ADDRESS
SHAFER,STUART R.,
1223 TURNER ST STE 333
THE GRAND CTR
LANSING MI 48906

BAR NO.
P-25599
Telephone No.
(517) 487-6603

OFFICER: CLARKE/JEFF/ DEPT: CLINTON CO SHERIFF

PROSECUTOR: SHERMAN,CHARLES D., P-33045
VICTIM/DESC:

COUNT 1 C/M/F: M 750520E1-A * PACC#750520E1-A
CRIMINAL SEXUAL CONDUCT - ATTEMPTED FOURTH DEGREE
REDUCED FROM
COUNT 1 C/M/F: F 750520D1A PACC#750.520D1A
CRIMINAL SEXUAL CONDUCT 3RD DEGREE PERSON THIRTEEN THROUGH FIFTEEN
ARRAIGNMENT DATE: 03/24/00 PLEA: PLEAD GUILTY PLEA DATE: 06/06/00
FINDINGS: DSP GLTY PL DISPOSITION DATE: 06/06/00
SENTENCING DATE: 06/06/00

FINE	COST	ST.COST	CON	MISC.	REST	TOT FINE	TOT DUE
200.00	431.00	9.00	0.00	80.00	0.00	720.00	0.00

JAIL SENTENCE: 45 DAYS PROBATION: 24 MONTHS PO: ESSICH,JOYCE,
PROBATION END DATE: 06/06/02
VEH IMMOB START DATE: NUMBER OF DAYS: VEH FORFEITURE:

BOND HISTORY:
35,000.00 SURETY BOND POSTED

DATE	ACTIONS, JUDGMENTS, CASE NOTES			INITIALS
03/04/00				
	1 ORIGINAL CHARGE	CSC 3RD < 13		CKH
	SCHEDULED FOR ARRAIGNMENT	32400 200P	2659	CKH
03/24/00				
	1 AUTHORIZATION OF COMPLAINT DATE			CKH
	PROS SHERMAN,CHARLES D.,		P-33045	CKH
	COMPLAINT ISSUANCE DATE			CKH
	ARRAIGNMENT HELD	CSC 3RD < 13		MAL
			# 2659	MAL
	STOOD MUTE			MAL
	SCHEDULED FOR PRELIMINARY EXAMINATION	040500 900A WELLS,RICHARD D.,	P-22177	MAL
	CASH			MAL

Exhibit Conviction Docket Sheet 1
MCL § 750.520e(1)-Attempted

M Crim JI 20.13 Criminal Sexual Conduct in the Fourth Degree

(1) The defendant is charged with the crime of fourth-degree criminal sexual conduct. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant intentionally [touched (*name complainant*)'s / made (*name complainant*) touch (his / her)] [genital area / groin / inner thigh / buttock / (or) breast] or the clothing covering that area.

(3) Second, that this touching was done for sexual purposes or could reasonably be construed as having been done for sexual purposes.

(4) [*Follow this instruction with M Crim JI 20.14a, M Crim JI, 20.14b, M Crim JI, 20.14c, M Crim JI, 20.14d, M Crim JI 20.15, M Crim JI 20.16, or M Crim JI, 20.16a, as warranted by the evidence.*]

Use Note

Use this instruction where the facts describe an offensive touching.

Where an offensive touching involving an employee of the Department of Corrections is alleged, an appropriate instruction conforming to MCL 750.520e(1)(c) should be drafted.

History

M Crim JI 20.13 (formerly CJI2d 20.13) was CJI 20:5:01, 20:5:02; amended September, 1992; September, 1999.

Reference Guide

Statutes

MCL 750.520e, .520l.

Case Law

People v Petrella, 424 Mich 221, 239 n10, 380 NW2d 11 (1985).

Exhibit Jury Instructions;
Mens Rea & Actus Rea

M Crim JI 20.14a Complainant Between Thirteen and Sixteen Years of Age and Defendant Five or More Years Older

Third, that [*name complainant*] was thirteen, fourteen, or fifteen years old at the time of the alleged act and defendant was then five or more years older than that.

Use Note

Use this instruction only in connection with the offense of criminal sexual conduct in the fourth degree, M Crim JI 20.13.

History

M Crim JI 20.14a (formerly CJI2d 20.14a) was adopted by the committee in September, 1996.

Exhibit Jury Instructions;
Causation Means MCL § 750.520e(l)(a)

M Crim JI 20.14b Complainant Sixteen or Seventeen Years of Age

(1) [Second / Third], that [*name complainant*] was sixteen or seventeen years old at the time of the alleged act.

[*Choose Option A or B:*]

A. *[School Teacher / Administrator]:*

(2) [Third / Fourth], that at the time of the alleged act, the defendant was [a teacher / a substitute teacher / an administrator] of [a public school / a nonpublic school / a school district / an intermediate school district] in which [*name complainant*] was enrolled.[1]

B. *[School Employee / Contractor / Volunteer / Government Employee]:*

(3) [Third / Fourth], that at the time of the alleged act, the defendant was

[Choose *Option 1 or 2*:]

1. *[School Employee / Contractor]:*

[an employee / a contractual service provider] of [a public school / a nonpublic school / a school district / an intermediate school district] in which [*name complainant*] was enrolled.

2. *(Volunteer / Government Employee):*

[a nonstudent volunteer / an employee of this state or of a local unit of government of this state or of the United States] assigned to provide any service to the [public school / nonpublic school / school district / intermediate school district] in which [*name complainant*] was enrolled.

(4) [Fourth / Fifth], that the defendant used that status to [gain access to / establish a relationship with] [*name complainant*].[2]

Use Note

Use this instruction where appropriate in conjunction with M Crim JI 20.12, Criminal Sexual Conduct in the Third Degree, or M Crim JI 20.13, Criminal Sexual Conduct in the Fourth Degree. If the complainant is less than 16 years old, M Crim JI 20.4 (Complainant Thirteen, Fourteen, or Fifteen Years of Age) may apply. If the complainant is over 18 years old, M Crim JI 20.14c (Complainant at Least Sixteen but Less Than Twenty-Six Years of Age Receiving Special Education Services) may apply.

[1] This paragraph does not apply if the complainant was emancipated or if the defendant and the complainant are lawfully married to each other. MCL 750.520d(1)(e)(i).

[2] This element only applies to Option B.

Exhibit Jury Instructions;
Causation Means MCL § 750.520e(l)(f)

History

M Crim JI 20.14b was added January 2015.

Reference Guide

Statutes

MCL 750.520d(1)(e); MCL 750.520e(1)(f)

Exhibit Jury Instructions;
Causation Means MCL § 750.520e(l)(f)

M Crim JI 20.14c Complainant At Least Sixteen But Less Than Twenty-Six Years of Age Receiving Special Education Services

(1) [Second / Third], that [*name complainant*] was at least sixteen years old but less than twenty-six years old at the time of the alleged act and was receiving special education services.

[*Choose Option A or B:*]

A. *[Teacher / Administrator / Employee / Contractor]:*

(2) [Third / Fourth], that at the time of the alleged act, the defendant was [a teacher / a substitute teacher / an administrator / an employee / a contractual service provider] of [a public school / a nonpublic school / a school district / an intermediate school district] from which [*name complainant*] was receiving special education services.[1]

B. *[Volunteer / Government Employee]:*

(3) [Third / Fourth], that at the time of the alleged act, the defendant was [a nonstudent volunteer / an employee of this state or of a local unit of government of this state or of the United States] assigned to provide any service to the [public school / nonpublic school / school district / intermediate school district] in which [*name complainant*] was enrolled.

(4) [Fourth / Fifth], that the defendant used that status [to gain access to / establish a relationship with] [*name complainant*].[2]

Use Note

Use this instruction where appropriate in conjunction with M Crim JI 20.12, Criminal Sexual Conduct in the Third Degree, or M Crim JI 20.13, Criminal Sexual Conduct in the Fourth Degree.

[1] This paragraph does not apply if the defendant and the complainant are lawfully married to each other. MCL 750.520d(1)(f)(i).

[2] This element only applies to Option B.

History

M Crim JI 20.14c was added January 2015.

Reference Guide

Statutes

MCL 750.520d(1)(f); MCL 750.520e(1)(g)

Exhibit Jury Instructions;
Causation Means MCL § 750.520e(l)(g)

M Crim JI 20.14d Complainant At Least Sixteen Years Old and Attending Day-Care or Residing in Foster-Care

(1) [Second / Third], that *[name complainant]* was at least sixteen years old and was [attending child-care at (*name of organization*) / residing in foster-care at (*name of facility*)] at the time of the alleged act.

[*Choose Option A or B:*]

A. *[Child-Care Contractor / Employee / Volunteer]:*

(2) [Third / Fourth], that at the time of the alleged act, the defendant was [an employee / a contractual service provider / volunteer] of [*name of organization*], which is a child-care organization.

B. *[Foster-Care Provider]:*

(3) [Third / Fourth], that at the time of the alleged act, the defendant was a licensed operator of [*name of facility*], which is a [foster-family home / foster-family group home].

Use Note

Use this instruction where appropriate in conjunction with M Crim JI 20.12, Criminal Sexual Conduct in the Third Degree, or with M Crim JI 20.13, Criminal Sexual Conduct in the Fourth Degree.

History

M Crim JI 20.14d was added January 2015.

Reference Guide

Statutes

MCL 750.520d(1)(g); MCL 750.520e(1)(h)

Staff Comment

The decision whether the institution where the complainant was attending or residing is a child-care organization or foster-care facility, as defined in §1 of 1973 PA 116, MCL 722.111, under MCL 750.520d or MCL 750.520e, appears to be a legal question decided by the court, if challenged by the defendant. This Comment has not been approved by the Supreme Court, and should not be considered an authoritative construction of the applicable statutes.

Exhibit Jury Instructions;
Causation Means MCL § 750.520e(l)(h)

M Crim JI 20.15 Use of Force or Coercion

[Second / Third], that the defendant used force or coercion to commit the sexual act. "Force or coercion" means that the defendant either used physical force or did something to make [*name complainant*] reasonably afraid of present or future danger.

Use Note

Use this instruction in conjunction with M Crim JI 20.12, Criminal Sexual Conduct in the Third Degree, or M Crim JI 20.13, Criminal Sexual Conduct in the Fourth Degree.

See M Crim JI 20.24, Definition of Sufficient Force.

History

M Crim JI 20.15 (formerly CJI2d 20.15) was CJI 20:4:06, 20:5:03.

Reference Guide

Statutes

MCL 750.520d, .520e.

Case Law

People v Eisen, 296 Mich App 326, 820 NW2d 229 (2012).

Exhibit Jury Instructions;
Causation Means MCL § 750.520e(l)(b)

M Crim JI 20.16 Complainant Mentally Incapable, Mentally Incapacitated, or Physically Helpless

(1) [Second / Third], that [*name complainant*] was [mentally incapable / mentally incapacitated / physically helpless] at the time of the alleged act.

[*Choose one or more of (a), (b), or (c):*]

(a) Mentally incapable means that [*name complainant*] was suffering from a mental disease or defect that made [him / her] incapable of appraising either the physical or moral nature of [his / her] conduct.

(b) Mentally incapacitated means that [*name complainant*] was unable to understand or control what [he / she] was doing because of [drugs or alcohol given to (him / her) / something done to (him / her)] without [his / her] consent.

(c) Physically helpless means that [*name complainant*] was unconscious, asleep, or physically unable to communicate that [he / she] did not want to take part in the alleged act.

(2) [Third / Fourth], that the defendant knew or should have known that [*name complainant*] was [mentally incapable / mentally incapacitated / physically helpless] at the time of the alleged act.

Use Note

Use this instruction in conjunction with M Crim JI 20.12, Criminal Sexual Conduct in the Third Degree, or M Crim JI 20.13, Criminal Sexual Conduct in the Fourth Degree.

History

M Crim JI 20.16 (formerly CJI2d 20.16) was CJI 20:4:07, 20:5:04; amended September 2005.

Reference Guide

Statutes

MCL 750.520d, .520e.

Exhibit Jury Instructions;
Causation Means MCL § 750.520e(l)(c)

M Crim JI 20.16a Related Within Third Degree

[Second / Third], that the defendant is related to the complainant by blood or marriage within the third degree as [*state relationship claimed*].

[The defendant has the burden of proving by a preponderance of the evidence (his / her) claim that the complainant was in a position of authority over (him / her) and used that authority to force the defendant to engage in the sexual conduct.]

Use Note

Use this instruction in conjunction with M Crim JI 20.12, Criminal Sexual Conduct in the Third Degree, or M Crim JI 20.13, Criminal Sexual Conduct in the Fourth Degree.

MCL 750.520d(1)(d) provides that this crime is committed only if the sexual conduct "occurs under circumstances not otherwise prohibited by this chapter." *People v Goold*, 241 Mich App 333, 615 NW2d 794 (2000).

History

M Crim JI 20.16a (formerly CJI2d 20.16a) was added by the committee in September, 1996 to reflect the changes in the statute made by 1996 PA 155.

Reference Guide

Statutes

MCL 750.520d, .520e.

Case Law

People v Goold, 241 Mich App 333, 615 NW2d 794 (2000).

Exhibit Jury Instructions;
Causation Means MCL § 750.520e(l)(d)

CHAPTER 109A SEXUAL ABUSE

§ 2241. Aggravated sexual abuse
§ 2242. Sexual abuse
§ 2243. Sexual abuse of a minor or ward
§ 2244. Abusive sexual contact
§ 2245. Offenses resulting in death
§ 2246. Definitions for chapter
§ 2247. Repeat offenders
§ 2248. Mandatory restitution

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§ 2241. Aggravated sexual abuse

(a) **By force or threat.** Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly causes another person to engage in a sexual act--

(1) by using force against that other person; or

(2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping;

or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

(b) **By other means.** Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly--

(1) renders another person unconscious and thereby engages in a sexual act with that other person; or

(2) administers to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby--

(A) substantially impairs the ability of that other person to appraise or control conduct; and

(B) engages in a sexual act with that other person;

or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

(c) **With children.** Whoever crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who has not attained the age of 12 years, or knowingly engages in a sexual act under the circumstances described in subsections (a) and (b) with another person who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than the person so engaging), or attempts to do so, shall be fined under this title and imprisoned for not less than 30 years or for life. If the defendant has previously been convicted of another Federal offense under this subsection, or of a State offense that would have been an offense under either

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such provision had the offense occurred in a Federal prison, unless the death penalty is imposed, the defendant shall be sentenced to life in prison.

(d) **State of mind proof requirement.** In a prosecution under subsection (c) of this section, the Government need not prove that the defendant knew that the other person engaging in the sexual act had not attained the age of 12 years.

(Added Nov. 10, 1986, P. L. 99-646, § 87(b), 100 Stat. 3620, and Nov. 14, 1986, P. L. 99-654, § 2, 100 Stat. 3660; Sept. 13, 1994, P. L. 103-322, Title XXXIII, § 330021(1), 108 Stat. 2150; Sept. 30, 1996, P. L. 104-208, Div A, Title I, § 101(a) [Title I, § 121 (subsec. 7(b))], 110 Stat. 3009-31; Oct 30, 1998, P. L. 105-314, Title III, § 301(a), 112 Stat. 2978; Jan. 5, 2006, P. L. 109-162, Title XI, Subtitle C, § 1177(a)(1), (2), 119 Stat. 3125; July 27, 2006, P. L. 109-248, Title II, §§ 206(a)(1), 207(2), 120 Stat. 613, 615; Dec. 26, 2007, P. L. 110-161, Div E, Title V, § 554, 121 Stat. 2082 .)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

Identical sections 2241 were added by Act Nov. 10, 1986 and Act Nov. 14, 1986.

Effective date of section:

Act Nov. 10, 1986, P. L. 99-646, § 87(e), 100 Stat. 3624, and Act Nov. 14, 1986, P. L. 99-654, § 4, 100 Stat. 3664, both of which appear as notes to this section, provide that this section shall take effect 30 days after their respective dates of enactment.

Amendments:

1994. Act Sept. 13, 1994, in subsec. (a)(2), substituted "kidnapping" for "kidnaping".

1996. Act Sept. 30, 1996 substituted subsec. (c) for one which read: "(c) With children. Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who has not attained the age of 12 years, or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.".

1998. Act Oct. 30, 1998, in subsec. (c), substituted "younger than the person so engaging" for "younger than that person".

2006. Act Jan. 5, 2006, in the introductory matter of subsecs. (a) and (b), and in subsec. (c), inserted "or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the Attorney General".

Act July 27, 2006, in subsecs. (a) and (b), in the introductory matter, inserted the comma following "Attorney General"; and, in subsec. (c), inserted the comma following "Attorney General", and substituted "and imprisoned for not less than 30 years or for life" for ", imprisoned for any term of years or life, or both".

2007. Act Dec. 26, 2007, substituted "the head of any Federal department or agency" for "the Attorney General" wherever appearing.

Short titles:

Act Nov. 10, 1986, P. L. 99-646, § 87(a), 100 Stat. 3620, provides: "This section may be cited as the

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'Sexual Abuse Act of 1986'.". For full classification of such section, consult USCS Tables volumes.

Act Nov. 14, 1986, P. L. 99-654, § 1, 100 Stat. 3660, provides: "This Act may be cited as the 'Sexual Abuse Act of 1986'.". For full classification of such Act, consult USCS Tables volumes.

Act Sept. 30, 1996, P. L. 104-208, Div A, Title I, § 101(a) [Title I, § 121(subsec. 7(a))], 110 Stat. 3009-31, provides: "This section [amending 18 USCS §§ 2241(c) and 2243(a)] may be cited as the 'Amber Hagerman Child Protection Act of 1996'.".

Other provisions:

Effective date of Nov. 10, 1986 amendments. Act Nov. 10, 1986, P. L. 99-646, § 87(e), 100 Stat. 3624, provides: "This section and the amendments made by this section [adding this section, among other things; for full classification, consult USCS Tables volumes] shall take effect 30 days after the date of the enactment of this Act.".

Effective date of Nov. 14, 1986 amendments. Act Nov. 14, 1986, P. L. 99-654, § 4, 100 Stat. 3664, provides: "This Act and the amendments made by this Act [adding 18 USCS §§ 2241-2245 among other things; for full classification, consult USCS Tables volumes] shall take effect 30 days after the date of the enactment of this Act.".

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§ 2242. Sexual abuse

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly--

(1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or

(2) engages in a sexual act with another person if that other person is--

(A) incapable of appraising the nature of the conduct; or

(B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act;

or attempts to do so, shall be fined under this title and imprisoned for any term of years or for life.

(Added Nov. 10, 1986, P. L. 99-646, § 87(b), 100 Stat. 3621, and Nov. 14, 1986, P. L. 99-654, § 2, 100 Stat. 3661; Sept. 13, 1994, P. L. 103-322, Title XXXIII, § 330021(1), 108 Stat. 2150; Jan. 5, 2006, P. L. 109-162, Title XI, Subtitle C, § 1177(a)(3), 119 Stat. 3125; July 27, 2006, P. L. 109-248, Title II, §§ 205, 207(2), 120 Stat. 613, 615; Dec. 26, 2007, P. L. 110-161, Div E, Title V, § 554, 121 Stat. 2082 .)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

Identical sections 2242 were added by Act Nov. 10, 1986 and Act Nov. 14, 1986.

Effective date of section:

Act Nov. 10, 1986, P. L. 99-646, § 87(e), 100 Stat. 3624, and Act Nov. 14, 1986, P. L. 99-654, § 4, 100 Stat. 3664, both of which appear as notes to 18 USCS § 2241, provide that this section shall take effect 30 days after their respective dates of enactment.

Amendments:

1994. Act Sept. 13, 1994, in para. (1), substituted "kidnapping" for "kidnaping".

2006. Act Jan. 5, 2006, in the introductory matter, inserted "or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the Attorney General".

Act July 27, 2006, in the introductory matter, inserted the comma following "Attorney General", and, in the concluding matter, substituted "and imprisoned for any term of years or for life" for ", imprisoned not more than 20 years, or both".

2007. Act Dec. 26, 2007, in the introductory matter, substituted "the head of any Federal department or agency" for "the Attorney General".

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10444083

§ 2243. Sexual abuse of a minor or ward

(a) **Of a minor.** Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who--

(1) has attained the age of 12 years but has not attained the age of 16 years; and

(2) is at least four years younger than the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

(b) **Of a ward.** Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who is--

(1) in official detention; and

(2) under the custodial, supervisory, or disciplinary authority of the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than 15 years or both.

(c) **Defenses.**

(1) In a prosecution under subsection (a) of this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the defendant reasonably believed that the other person had attained the age of 16 years.

(2) In a prosecution under this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the persons engaging in the sexual act were at that time married to each other.

(d) **State of mind proof requirement.** In a prosecution under subsection (a) of this section, the Government need not prove that the defendant knew--

(1) the age of the other person engaging in the sexual act; or

(2) that the requisite age difference existed between the persons so engaging.

(Added Nov. 10, 1986, P. L. 99-646, § 87(b), 100 Stat. 3621 and Nov. 14, 1986, P. L. 99-654, § 2, 100 Stat. 3661; Nov. 29, 1990, P. L. 101-647, Title III, Subtitle B, § 322, 104 Stat. 4818; Sept. 30, 1996, P. L. 104-208, Div A, Title I, § 101(a) [Title I, § 121(subsec. 7(c))], 110 Stat. 3009-31; Oct 30, 1998, P. L. 105-314, Title III, § 301(b), 112 Stat. 2979; Jan. 5, 2006, P. L. 109-162, Title XI, Subtitle C, § 1177(a)(4), (b)(1), 119 Stat. 3125; July 27, 2006, P. L. 109-248, Title II, § 207, 120 Stat. 615; Dec. 26, 2007, P. L. 110-161, Div E, Title V, § 554, 121 Stat. 2082 .)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

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Explanatory notes:

Identical sections 2243 were added by Act Nov. 10, 1986 and Act Nov. 14, 1986.

Effective date of section:

Act Nov. 10, 1986, P. L. 99-646, § 87(e), 100 Stat. 3624 and Act Nov. 14, 1986, P. L. 99-654, § 4, 100 Stat. 3664, both of which appear as 18 USCS § 2241 note, provide that this section shall take effect 30 days after their respective enactment.

Amendments:

1990. Act Nov. 29, 1990, in subsec. (a), in the concluding matter, substituted "15 years" for "five years".

1996. Act Sept. 30, 1996, in subsec. (a), in the introductory matter, inserted "crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or".

1998. Act Oct. 30, 1998, in subsec. (a), in the introductory matter, deleted "crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or" following "Whoever".

2006. Act Jan. 5, 2006, in the introductory matter of subsecs. (a) and (b), inserted "or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the Attorney General"; and, in the concluding matter of subsec. (b), substituted "five years" for "one year".

Act July 27, 2006, in subsec. (a), in the introductory matter, inserted the comma following "Attorney General"; and, in subsec. (b), in the introductory matter, inserted the comma following "Attorney General", and, in the concluding matter, substituted "15 years" for "five years".

2007. Act Dec. 26, 2007, substituted "the head of any Federal department or agency" for "the Attorney General" wherever appearing.

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For Use With § 2252A(b)(2)

10444089

§ 2244. Abusive sexual contact

(a) **Sexual conduct in circumstances where sexual acts are punished by this chapter [18 USCS §§ 2241 et seq.].** Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in or causes sexual contact with or by another person, if so to do would violate--

(1) subsection (a) or (b) of section 2241 of this title [18 USCS § 2241] had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than ten years, or both;
(2) section 2242 of this title [18 USCS § 2242] had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than three years, or both;
(3) subsection (a) of section 2243 of this title [18 USCS § 2243] had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than two years, or both;
(4) subsection (b) of section 2243 of this title [18 USCS § 2243] had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than two years, or both; or
(5) subsection (c) of section 2241 of this title [18 USCS § 2241] had the sexual contact been a sexual act, shall be fined under this title and imprisoned for any term of years or for life.

(b) **In other circumstances.** Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in sexual contact with another person without that other person's permission shall be fined under this title, imprisoned not more than two years, or both.

(c) **Offenses involving young children.** If the sexual contact that violates this section (other than subsection (a)(5)) is with an individual who has not attained the age of 12 years, the maximum term of imprisonment that may be imposed for the offense shall be twice that otherwise provided in this section.

(Added Nov. 10, 1986, P. L. 99-646, § 87(b), 100 Stat. 3622, and Nov. 14, 1986, P. L. 99-654, § 2, 100 Stat. 3661; Nov. 18, 1988, P. L. 100-690, Title VII, Subtitle B, § 7058(a), 102 Stat. 4403; Sept. 13, 1994, P. L. 103-322, Title XXXIII, § 330016(1)(K), 108 Stat. 2147; Oct 30, 1998, P. L. 105-314, Title III, § 302, 112 Stat. 2979; Jan. 5, 2006, P. L. 109-162, Title XI, Subtitle C, § 1177(a)(5), (b)(2), 119 Stat. 3125; July 27, 2006, P. L. 109-248, Title II, §§ 206(a)(2), 207(2), 120 Stat. 613, 615; Dec. 26, 2007, P. L. 110-161, Div E, Title V, § 554, 121 Stat. 2082 .)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

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Identical sections 2244 were added by Act Nov. 10, 1986 and Act Nov. 14, 1986.

Effective date of section:

Section 87(e) of Act Nov. 10, 1986, P. L. 99-646, and § 4 of Act Nov. 14, 1986, P. L. 99-654, both of which appear as notes to 18 USCS § 2241, provide that this section shall take effect 30 days after their respective dates of enactment.

Amendments:

1988. Act Nov. 18, 1988, in subsec. (a), in para. (1), substituted "ten years" for "five years", and in para. (3), substituted "two years" for "one year".

1994. Act Sept. 13, 1994, in subsecs. (a)(4) and (b), substituted "under this title" for "not more than $5,000".

1998. Act Oct. 30, 1998 added subsec. (c).

2006. Act Jan. 5, 2006, in subsec. (a), in the introductory matter, inserted "or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the Attorney General", and, in para. (4), substituted "two years" for "six months"; and, in subsec. (b), inserted "or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the Attorney General" and substituted "two years" for "six months".

Act July 27, 2006, in subsec. (a), in the introductory matter, inserted the comma following "Attorney General", in para. (1), inserted "subsection (a) or (b) of", in para. (3), deleted "or" following the concluding semicolon; in para. (4), substituted "; or" for a concluding period, and added para. (5); in subsec. (b), inserted the comma following "Attorney General"; and, in subsec. (c), inserted "(other than subsection (a)(5))".

2007. Act Dec. 26, 2007, substituted "the head of any Federal department or agency" for "the Attorney General" wherever appearing.

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§ 2246. Definitions for chapter

As used in this chapter [18 USCS §§ 2241 et seq.]--

(1) the term "prison" means a correctional, detention, or penal facility;

(2) the term "sexual act" means--

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

(3) the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

(4) the term "serious bodily injury" means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty;

(5) the term "official detention" means--

(A) detention by a Federal officer or employee, or under the direction of a Federal officer or employee, following arrest for an offense; following surrender in lieu of arrest for an offense; following a charge or conviction of an offense, or an allegation or finding of juvenile delinquency; following commitment as a material witness; following civil commitment in lieu of criminal proceedings or pending resumption of criminal proceedings that are being held in abeyance, or pending extradition, deportation, or exclusion; or

(B) custody by a Federal officer or employee, or under the direction of a Federal officer or employee, for purposes incident to any detention described in subparagraph (A) of this paragraph, including transportation, medical diagnosis or treatment, court appearance, work, and recreation;

but does not include supervision or other control (other than custody during specified hours or days) after release on bail, probation, or parole, or after release following a finding of juvenile delinquency; and

(6) the term "State" means a State of the United States, the District of Columbia, and any commonwealth, possession, or territory of the United States.

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Exhibit Federal Abuse Definitions
For Use With § 2252A(b)(2)

(Added Nov. 10, 1986, P. L. 99-646, § 87(b), 100 Stat. 3622 and Nov. 14, 1986, P. L. 99-654, § 2, 100 Stat. 3662; Sept. 13, 1994, P. L. 103-322, Title IV, Subtitle E, § 40502, Title VI, § 60010(a), 108 Stat. 1945, 1972; Oct 30, 1998, P. L. 105-314, Title III, § 301(c), 112 Stat. 2979 .)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

Identical sections 2245 were added by Act Nov. 10, 1986 and Act Nov. 14, 1986.

Effective date of section:

Act Nov. 10, 1986, P. L. 99-646, § 87(e), 100 Stat. 3624, and Act Nov. 14, 1986, P. L. 99-654, § 4, 100 Stat. 3664, both of which appear as 18 USCS § 2241 note, provide that this section shall take effect 30 days after their respective dates of enactment.

Amendments:

1994. Act Sept. 13, 1994, in para. (2), in subpara. (B), deleted "or" after the concluding semicolon, in subpara. (C), substituted "; or" for "; and", and added subpara. (D).

Such Act further redesignated this section, enacted as § 2245, as § 2246.

1998. Act Oct. 30, 1998, in para. (5), substituted "; and" for a concluding period, and added para. (6).

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Lead Reports

Sentencing

SCOTUS Rejects Vagueness Challenge To Sentencing Guidelines

The catchall definition of "crime of violence" in the advisory U.S. Sentencing Guidelines can't be void for vagueness under the due process clause, the U.S. Supreme Court held March 6 (*Beckles v. United States*, U.S., No. 15-8544, *affirmed* 3/6/17).

Travis Beckles was sentenced as a career offender under the guidelines, which define a career offender as one who "has at least two prior felony convictions of either a crime of violence or a controlled substance offense."

Section 4B1.2(a)(2) defines a "crime of violence" as either having certain elements, being an enumerated offense or being one that "otherwise involves conduct that presents a serious potential risk of physical injury to another."

This catchall language is almost identical to the catchall provision in the Armed Career Criminal Act.

The ACCA language was struck down by the Supreme Court as unconstitutionally vague in *Johnson v. United States*, 2015 BL 204915 (U.S. June 26, 2015).

Beckles asked the court to hold that the language in the guidelines is similarly vague in violation of due process.

Discretion, Not Vagueness. The court distinguished *Johnson* and held that the guidelines "are not subject to a vagueness challenge under the Due Process Clause," in an opinion by Justice Clarence Thomas.

Unlike the ACCA, "the advisory Guidelines do not fix the permissible range of sentences. To the contrary, they merely guide the exercise of a court's discretion in choosing an appropriate sentence within the statutory range."

An advisory sentencing guideline fails to fall under one of the two types of provisions the court has previously found void for vagueness: those that "define criminal offenses" and those that "fix the permissible sentences for criminal offenses," the court said.

The guidelines also fail to implicate "the twin concerns underlying vagueness doctrine—providing notice and preventing arbitrary enforcement," the court said.

The court has never suggested that a defendant can successfully challenge as vague a sentencing statute allowing a judge to select an appropriate sentence from within a statutory range, even when that discretion is unfettered.

"If a system of unfettered discretion is not unconstitutionally vague, then it is difficult to see how the present system of guided discretion could be," it said.

Thousands of cases have been waiting in the pipeline for a decision in this case, Deputy U.S. Solicitor General Michael R. Dreeben told the court during oral argument.

In separate concurrences, Justices Ruth Bader Ginsburg and Sonia Sotomayor said the court did not need to issue such a sweeping opinion in this case when Beckles's offense of conviction—possessing a sawed-off shotgun as a felon—meant that the catchall definition did not have to come into play at his sentencing.

Sotomayor accused the majority of casting the court's "sentencing jurisprudence into doubt."

The Department of Justice declined to comment on the decision.

Professor Carissa Byrne Hessick of the University of North Carolina School of Law, Chapel Hill, N.C., told Bloomberg BNA that "the court's opinion ignores entirely the fact that many lower federal courts continue to treat the Federal Sentencing Guidelines as mandatory."

Thomas's opinion repeatedly mentions the advisory nature of the guidelines.

The "court should require sentencing judges to justify within-guideline sentences, and the court should reverse circuit court cases that have limited sentencing judges' ability to sentence outside of the guidelines. The guidelines should not be treated as advisory only when doing so advances the interests of prosecutors," she added.

By Alisa Johnson

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Full text at http://www.bloomberglaw.com/public/document/Beckles_v_United_States_No_158544_2017_BL_68304_US_Mar_06_2017_Co.

Supreme Court

Questionable Statistic Pervades High Court Sex Offender Cases

Statistics about the likelihood of sex offenders to re-offend took center stage during U.S. Supreme Court oral arguments Feb. 27 (*Packingham v. North Carolina*, U.S., No. 15-1194, *argued* 2/27/17).

The case concerned a North Carolina law prohibiting registered sex offenders from visiting social media and other websites like Facebook, YouTube and NYTimes.com.

But much of the debate focused on a hotly contested statistic highlighted in two Supreme Court opinions, Carissa Hessick—a law professor at the University of North Carolina, Chapel Hill, N.C., whose research focuses on criminal sentencing, criminal law and child pornography—told Bloomberg BNA.

Multiple studies from legal and psychology scholars undermined the "conventional wisdom" that sex offender re-offense rates are high, Hessick said Feb. 27.

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In fact, many studies have found sex offender re-offense rates are lower than those of offenders who commit non-sexual crimes, she said.

But a Justice Department report cited by North Carolina's brief suggests those studies may fail to take into account under-reporting by victims of sex crimes and other factors, and that the actual re-offense rate is higher. But it has little reliable data to support that suggestion.

Cited by SCOTUS. North Carolina Senior Deputy Attorney General Robert C. Montgomery repeatedly stated at oral argument that sex offenders have higher rates of recidivism than other offenders. Montgomery specifically referenced statistics cited in the 2003 Supreme Court case *Smith v. Doe*, which upheld the constitutionality of sex offender registries.

The statistic mentioned in *Smith v. Doe*—that 80 percent of convicted sex offenders will offend again—is off by an average of 65 percent, depending on offenders' risk levels, according to research from Arizona State University law professor Ira Ellman.

If the Supreme Court relied on the faulty figures again, the ruling would unjustly ban sex offenders who have already served their sentences from maintaining accounts on social media websites like Facebook, YouTube or newspaper websites that allow minors to become members or create profiles, Ellman told Bloomberg BNA Feb. 27.

That makes the First Amendment claim much more powerful than it might appear, because the people affected by the law pose "no clear and present danger," Ellman said. "They're no more likely to offend than most of us."

'Up For Dispute.' Ellman told Bloomberg BNA that his research has found re-offense figures are closer to 5 percent for low-risk offenders, 10 percent for medium-risk offenders, and 30 percent for high-risk offenders. Risk factors vary according to different evaluations, but seek to analyze propensity for re-offense based on behavior and psychology, rather than just on the offense itself.

Despite variations in the exact numbers, all the research indicates recidivism rates are lower than those of offenders who commit non-sexual crimes, Ellman and Hessick agreed.

For example, the Association for the Treatment of Sexual Abusers cited in its amicus brief to a study on sex offender re-offense after prison, which found that about 5.3 percent of convicted sex offenders committed another sex offense.

ATSA is an organization of people who work with sex offenders, including parole officers, psychologists, victims' advocates and academics.

"The problem that we're running into is that the Supreme Court has rested its blessing for sex offender registries at least in part on that fact" that sex offenders have high recidivism rates, Hessick said. "But I actually think that's a fact that's very much up for dispute."

Hessick said many studies and data collection efforts—especially those conducted by government institutions like prison administrations—that cite high re-offense rates are fraught with less reputable research methods. Data from civil commitment programs, for example, often offer skewed data, because inmates have fabricated past crimes to avoid serving their sentences with general prison populations, according to The New Yorker.

Dubious Origins. The 80 percent figure appears not to be based on any sort of research or data collection, Ellman said. *Smith v. Doe* got the number from an opinion from the year before.

Justice Anthony M. Kennedy wrote that opinion, *McKune v. Lile*, and called the figure "frightening and high."

It cited to a Justice Department memorandum, which in turn pointed to a brief from the U.S. Solicitor General that was ultimately traced back to a 1986 Psychology Today article, Ellman said. That piece was written by an Oregon prison psychologist with a master's degree and no research background, who claimed that his sex offender treatment program worked better than anyone else's, Ellman said.

Ellman discredited the figure in an article published by Constitutional Commentary, a faculty-edited journal at the University of Minnesota law school.

At the very least, a single number shouldn't be used to indicate re-offense because the range of dangerousness and different types of sexual crimes is so wide, both Ellman and Hessick said. The most dangerous offenders usually don't suffer under restrictive laws like North Carolina's because they're usually still in prison, Ellman said.

It's also important to keep in mind that many restrictive laws apply to underage kids themselves, Hessick said. Juvenile defendants 16 years old or older are automatically tried as adults in North Carolina, she said. Kids who are prosecuted for statutory rape of a younger romantic partner are banned from interacting with minors, who are their peers, on social networking websites.

These types of restrictive laws can sometimes encourage re-offense by alienating former offenders, Maia Christopher, executive director of ATSA, said. Cutting them off from websites that can offer communication with friends and family, offer job seeking opportunities or just allow them to feel part of a community can increase the risk of recidivism, Christopher said.

"Oftentimes we're very fearful of people who commit sexual offenses," she said. "Unfortunately the policies put in place don't often evaluate what keeps people from re-offending and what we can put in place that will make it less likely that they will offend."

Failure to Report. In its brief, North Carolina cites to a Justice Department report that mentions the low recidivism rate in the context of studies about under-reporting of sex crimes and studies quoting higher re-offense rates.

Because sex crimes are under-reported, recidivism is likely higher than lower re-offense rates suggest, the brief argues. But neither the brief nor the report contain any data directly connecting low reporting to low re-offense rates.

"Petitioner is on even weaker ground when he suggests that registered sex offenders pose no greater risk than members of the general public," the brief states. "Not surprisingly, no lower court in this case made a finding of fact with respect to that unsupported and astonishingly counter-intuitive claim. And the claim merits little credence, in large part because recidivism rates do not nearly reflect the actual rate of re-offense by sex offenders."

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In an amicus brief supporting North Carolina's law, two organizations—Stop Child Predators and Shared Hope International, which advocate on behalf of victims of child sexual abuse—say that research and data support the need for strict laws, but also cited *Smith v. Doe* and the Justice Department report without acknowledging any other studies calling that data into doubt.

"The risk that these offenders will access the online personalities of children through social-networking platforms and use those platforms to sexually exploit children is quite real," the brief states. "And limiting social-networking access for a class of persons who pose a heightened statistical risk of abusing the information generated on those platforms is reasonable and compelling."

"It is reasonable for legislatures and courts to consider whether—relative to other members of society, or other convicted criminals—registered sex offenders present an elevated risk of committing sex crimes in the future," Samantha Vardaman, senior director at Shared Hope International wrote Bloomberg BNA in an email March 7. She cited the Justice Department report, *Smith v. Doe*, and a 2003 Bureau of Justice Statistics report examining recidivism rates for sex offenders released in 1994.

"Legislatures have responded reasonably with laws protecting children from online exploitation and recruitment by restricting access from those who present a heightened risk of committing sex crimes," she wrote.

The North Carolina Attorney General didn't respond to repeated requests for comment. A request for comment to the law firm Latham & Watkins LLP, Washington, who wrote the brief for Stop Child Predators and Shared Hope International, was not returned.

By Jessica DaSilva

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Juries

Racism Enough to Pierce Jury Secrecy

Racism in the criminal justice system is sufficiently pernicious to allow defendants to pierce jury room secrecy, the U.S. Supreme Court ruled March 6 (*Peña-Rodriguez v. Colorado*, U.S., No. 15-606, *reversed* 3/6/17).

The nation must still make strides to overcome racial discrimination, and "blatant racial prejudice is antithetical to the functioning of the jury system and must be confronted in egregious cases like this one," Justice Anthony M. Kennedy wrote for the 5-3 court.

Therefore, "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires" that jury secrecy give way, the court said.

The opinion shows a recent trend toward explicit recognition of racial bias in the criminal justice system by the Supreme Court, Brooklyn Law Professor Jocelyn Simonson, who studies race and the criminal justice system, told Bloomberg BNA March 6.

The opinion is similar in that respect to Chief Justice John G. Roberts's majority opinion in Buck v. Davis Feb. 22, and Justice Sonia Sotomayor's 2016 dissenting opinion in Utah v. Strieff, Simonson said.

"We have another justice in a week acknowledging the racialized nature of criminal justice," she said. "I think it reflects how people in general talk about criminal justice. I could easily imagine the same decision 10 years ago having the same result but without the language about the history of racial oppression in criminal justice."

Practically speaking, Simonson said the decision will likely mean criminal defense attorneys in federal court may now approach jurors after they issue verdicts to confirm, if they suspect issues of racial bias affected the verdict.

No Impeachment Rule. Miguel Peña-Rodriguez was accused of sexually assaulting two teenage girls in the bathroom at a horse racing facility in Colorado. He was tried and convicted of lesser charges.

Following the trial, two jurors told Peña-Rodriguez's counsel that a third juror, H.C., had shown racial bias during deliberations.

H.C. expressed his opinion that Mexican men were physically controlling of women because of a sense of entitlement, and that he believed that Peña-Rodriguez was guilty " 'because he's Mexican and Mexican men take whatever they want,' " according to the jurors.

H.C. also discounted the evidence of an alibi witness because he—wrongly—believed the witness to be " 'an illegal,' " the jurors said.

But the court denied Peña-Rodriguez's motion for a new trial. Colorado, like many states and the federal government, generally prohibits a juror from testifying about statements made during deliberations in a proceeding inquiring into the validity of a finalized verdict.

This "no-impeachment" rule is designed to protect juries and the finality of jury verdicts. "It promotes full and vigorous discussion," and assures juror that they won't be "harassed or annoyed by litigants seeking to challenge the verdict," the court said.

In previous cases the court had said that there might be an exception to the no impeachment rule, but it had yet to find one.

Rise Above. "It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons," the court said.

Peña-Rodriguez's case "lies at the intersection" of the no impeachment rule and the long history of Supreme Court decisions seeking to eliminate racial prejudice in the justice system. "The two lines of precedent, however, need not conflict," the court said.

Previous attempts to get around the no impeachment rule had involved anomalous, irregular conduct like drug use by the jury.

"The same cannot be said about racial bias, a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice," the court said.

The Sixth Amendment therefore requires that the no impeachment rule give way to allow courts to investigate allegations that racial bias infected jury deliberations.

No Dividing Line. Justice Samuel A. Alito Jr. dissented, joined by Roberts and Justice Clarence Thomas.

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"Sex and Kids: The unjust, irrational, and unconstitutional Consequences of Pedophilia Panic" ~ Jacob Sullum

"SOUNDS LIKE YOU ENJOY SEX WITH KIDS,"

a reader tweeted at me after seeing a blog post I wrote about former Subway pitchman Jared Fogle. It was 2015, and Fogle had just signed a plea agreement in which he admitted to looking at child pornography and having sex with two 16-year-old prostitutes. "You also look like [a] pervert," the reader added.

That's the sort of response you can expect if you write about the broad category known as "sex offenders" and suggest that not all of them are the same or that some of them are punished too severely. In this case, I had noted that the decision to prosecute Fogle under federal law, which had been justified by factors that had little or nothing to do with the gravity of his offenses, had a dramatic impact on the penalty he was likely to receive.

Fogle ultimately was sentenced to nearly 16 years in prison, a penalty that was upheld by a federal appeals court in June. Had he been prosecuted under state law for the same actions, his sentence could have been as short as six months (the minimum penalty for possessing child pornography in Indiana, where Fogle lived) or as long as four years (the maximum penalty for an adult 21 or older who has sex with a 16-year-old in New York, where Fogle met the prostitutes).

The arbitrariness of Fogle's punishment should trouble anyone who thinks fairness, consistency, and proportionality are essential to a criminal justice system worthy of the name. But the conjunction of two fraught topics—children and sex—makes it hard for people to think clearly about such matters. The fear and disgust triggered by this subject help explain why laws dealing with sex offenses involving minors frequently lead to bizarre results, including wildly disproportionate sentences, punishment disguised as regulation or treatment, and penalties for committing unintentional crimes, recording your own legal behavior, or looking at pictures of nonexistent children.

HIDDEN CAMERAS

UNLIKE RUSSELL TAYLOR, who ran Fogle's charitable foundation, Fogle was not accused of producing child pornography. He was instead charged with looking at photographs and video of "minors as young as approximately 13-14 years" who were "secretly filmed in Taylor's current and former residences."

According to the government's statement of charges, Taylor produced that material "using multiple hidden cameras concealed in clock radios positioned so that they would capture the minors changing clothes, showering, bathing, or engaging in other activities." He also gave Fogle a thumb drive containing "commercial child pornography" featuring minors as young as 6. Fogle "on one occasion" showed this material to "another person." That became the basis for a distribution charge, which was dropped as part of Fogle's plea agreement. Fogle's lawyers say that incident involved "one individual with whom [he] was then involved romantically, and it occurred in the confines of a locked hotel room."

The voyeuristic material that Taylor produced did not involve sexual abuse of children. According to the charges, the guests caught on Taylor's cameras "did not know that they were being secretly filmed." Taylor's actions, which earned him a 27-year prison sentence, were obviously an outrageous invasion of privacy and breach of trust, and Fogle bears responsibility, at the very least, for allowing the secret recordings to continue by failing to report him. (Taylor, seeking leniency, claimed Fogle had actually encouraged him to install the cameras.) But what Taylor did is not the same as forcing children to engage in sexual activity, and what Fogle did is even further removed from such abuse.

Under federal law, however, looking at child pornography can be punished as severely as sexually assaulting a child. Receiving child pornography, which could mean viewing a single image, triggers a mandatory minimum sentence of five years. The maximum penalty for receiving or distributing child pornography is 20 years, and federal sentencing guidelines recommend stiff enhancements based on factors that are very common in these cases, such as using a computer, possessing more than 600 images (with each video counted as 75 images), and trading images for something of value, including other images.

In exchange for Fogle's guilty plea, prosecutors agreed to ask for a sentence of no more than 151 months. His lawyers argued that 60 months, the mandatory minimum, would be more appropriate. Rather than settle on a number somewhere between those two suggestions, U.S. District Judge Tanya Walton Pratt sentenced Fogle to 188 months—almost 16 years—for looking at the pictures Taylor provided. That prison term was not only longer than the government had sought; it was longer than the upper end of the range recommended by federal sentencing guidelines. Last June the U.S. Court of Appeals for the 7th Circuit upheld Fogle's sentence, which means he will spend at least 13 years behind bars, even allowing for "good time credit" based on his behavior in prison.

If Fogle had been prosecuted under Indiana law for possession of child pornography, he would have faced a minimum sentence of six months and a maximum sentence of three years. Even assuming he would have received the maximum penalty, the decision to prosecute him under federal law effectively quintupled his sentence. Yet the official reason for prosecuting him

Exhibit.

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under federal law—that the images he viewed were produced using equipment "manufactured outside the State of Indiana"—does not make his actions (or his inaction) any worse.

LIFE FOR LOOKING

AS A RESULT of congressional edicts, the average sentence in federal child pornography cases that do not involve production rose from 54 months in 2004 to 95 months in 2010, according to a 2012 report from the U.S. Sentencing Commission (USSC). Many federal judges have rebelled against what they perceive as patently unjust sentences for such offenses. In 2005 the Supreme Court ruled that federal sentencing guidelines (as opposed to mandatory minimums set by statute) are merely advisory, freeing judges to depart from them in the interest of justice. After that decision, according to the 2012 USSC report, "the rate of non-production cases in which sentences were imposed within the applicable guideline range steadily fell from its high point in fiscal year 2004, at 83.2 percent of cases, to 40.0 percent of cases in fiscal year 2010, and to 32.7 percent of cases in fiscal year 2011."

In 2016, Jack B. Weinstein, a federal judge in Brooklyn, was called upon to sentence a 53-year-old father of five who had pleaded guilty to possessing two dozen photos and videos showing children in sexual situations. The defendant—identified only by his initials, R.V.—told NBC News he came across the images that led to his arrest while looking at adult pornography. "I just got caught up in it," he said. "It's not like I woke up and said, 'Listen, let me look at this stuff.' It kept popping up every time I was downloading." He added that "I feel very remorseful," and "it's something that will never happen again." NBC reported that "the man also had 'sexual' chats with underage girls online, but there was no evidence he sought physical contact with minors." A psychiatrist testified that R.V. did not pose a threat to his own kids or other children.

The sentencing guidelines recommended a prison term of six and a half to eight years. Instead, Weinstein sentenced R.V. to time served (five days), a fine, and seven years of supervised release. "The applicable structure does not adequately balance the need to protect the public, and juveniles in particular, against the need to avoid excessive punishment, with resulting unnecessary cost to defendants' families and the community, and the needless destruction of defendants' lives," Weinstein wrote in a 98-page explanation of his reasons for departing so dramatically from the guidelines. "Removing R.V. from his family will not further the interests of justice; it will cause serious harm to his young children by depriving them of a loving father and role model, and will strip R.V. of the opportunity to heal through continued sustained treatment and the support of his close family."

Judges are not alone in questioning the propriety of federal sentences for viewing and sharing child pornography. In a 2015 case, James Gwin, a federal judge in Cleveland, asked jurors what sentence they considered appropriate for a man they had convicted of possessing and distributing child pornography. The defendant was caught with 1,500 images, and he was charged with distribution because he also had peer-to-peer file sharing software. The mandatory minimum was five years, prosecutors wanted 20, and federal sentencing guidelines recommended 27. On average, the jurors recommended a prison term of 14 months, less than a quarter of the shortest sentence allowed by law.

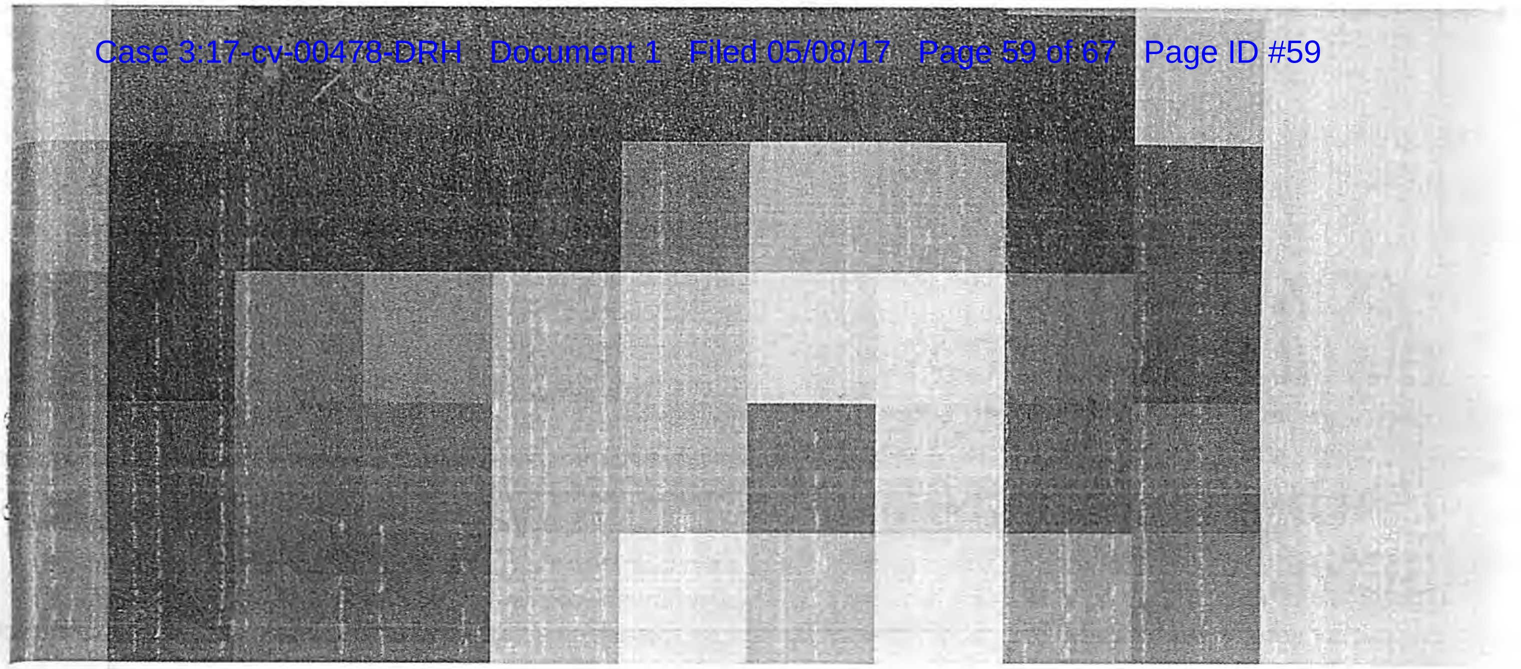
Although state penalties for looking at child pornography are often lighter than federal penalties, they can also be more severe. In 2011, a Florida judge imposed a sentence of life without the possibility of parole on Daniel Enrique Guevara Vilca, a 26-year-old with no criminal record who was caught with 454 child pornography images on his computer. "Had Mr. Vilca actually molested a child," *The New York Times* noted, "he might well have received a lighter sentence."

AMY'S ORDEAL

SOMETHING HAS GONE terribly wrong with our criminal justice system when the same offense can be punished by five days in jail or by life in prison, depending on the whims of legislators and judges. One reason it is so hard to figure out an appropriate punishment for looking at child pornography is that it's not exactly clear why looking at child pornography is treated as a crime in the first place.

The First Amendment ordinarily protects people from punishment for the literature they read or the pictures they view, even if a jury might consider the material obscene. When the Supreme Court upheld a state law criminalizing mere possession of child pornography in the 1990 case *Osborne v. Ohio*, its main rationale was that the government "hopes to destroy a market for the exploitative use of children." In other words, punishing consumers is justified because their demand drives production, which requires the sexual abuse of children. Now that people who look at child pornography typically obtain it online for free, that argument carries much less weight, and another rationale mentioned by the Supreme Court has come to the fore: "The pornography's continued existence causes the child victims continuing harm by haunting the children in years to come."

The Court reiterated that point in *Ashcroft v. Free Speech Coalition*, the 2002 case in which it overturned a ban on "virtual" child pornography—i.e., depictions of underage sexual activity that do not involve any actual children. "As a permanent record of a child's abuse, the continued circulation [of actual



child pornography] itself would harm the child who had participated," the Court said. "Like a defamatory statement, each new publication of the speech would cause new injury to the child's reputation and emotional well-being."

Lower federal courts have elaborated on that theme, positing that children are revictimized every time images of their sexual abuse are transferred or viewed. In 2001, the U.S. Court of Appeals for the 7th Circuit—the same court that upheld Jared Fogle's sentence—declared that "the possession, receipt and shipping of child pornography directly victimizes the children portrayed by violating their right to privacy, and in particular violating their individual interest in avoiding the disclosure of personal matters." The Adam Walsh Child Protection and Safety Act, which Congress passed in 2006, likewise declares that "every instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse."

It is surely true that the dissemination of child pornography compounds the harm caused by its production. Consider the case of "Amy," who at the ages of 8 and 9 was repeatedly raped by her uncle, who recorded his crimes and distributed the images. New York attorney James R. Marsh, who helped Amy pursue a federal restitution claim, and University of Utah law professor Paul Cassell, who represented her when her case reached the Supreme Court, described her experience in a 2015 *Ohio State Journal of Criminal Law* article.

"By the end of her treatment in 1999," Cassell and Marsh write, "Amy was—as reflected in her therapist's notes—'back to normal' and engaged in age-appropriate activities such as dance lessons. Sadly, eight years later, Amy's condition drastically deteriorated when she discovered that her child sex abuse images are widely traded on the Internet." According to her psychologist, the distribution of her uncle's pictures has had a "long lasting and life changing impact on her." The psychologist explained that "Amy's awareness of these pictures [and] knowledge of new defendants being arrested become ongoing triggers to her." As Amy put it, "Every day of my life I live in constant fear that someone will see my pictures and recognize me and that I will be humiliated all over again."

Notwithstanding the reality of Amy's ongoing suffering, allocating responsibility for it among the thousands of people who have seen the pictures is no simple matter, as the Supreme Court discovered when it took up her case in 2014. Amy's lawyers put the past and future cost of her sexual abuse, including lifelong psychotherapy, an interrupted college education, and reduced earning capacity, at $3.4 million, some of which was attributed to her knowledge that images of her uncle's crimes against her are circulating on the internet. Under a federal law that requires a defendant to pay his victim "the full amount of the victim's losses," Amy sought all $3.4 million from Doyle Paroline, who in 2008 was caught with a collection of child pornography that included two pictures of Amy.

Paroline's lawyer argued that he owed her nothing because downloading the pictures her uncle took was not the proximate cause of her suffering. The Obama administration said judges should assess restitution on a case-by-case basis. Another possible approach: If you divide $3.4 million by the estimated 70,000 people who have seen photographs or videos of the crimes committed by Amy's uncle, the result is less than $50.

None of these solutions is very satisfying. Once images of sexual abuse have been viewed 1,000 times, Justice Samuel Alito wondered aloud during oral argument, is it even theoretically possible to assess the damage caused by the 1,001st viewing? In the end, the Supreme Court ruled that a defendant owes restitution "only to the extent the defendant's offense proximately caused a victim's losses." Hence a court "should order

Illustration: Joanna Andreasson

LOOKING AT A SINGLE IMAGE CAN TRIGGER A FIVE-YEAR MANDATORY MINIMUM SENTENCE.

restitution in an amount that comports with the defendant's relative role in the causal process that underlies the victim's general losses." Applying that logic to child pornography cases, the Court conceded, "is not without its difficulties"—quite an understatement.

If figuring out the damage that Paroline did by looking at images of Amy is essentially impossible, deciding what criminal penalty he deserves is at least as challenging. He pleaded guilty to possession of child pornography and received a two-year sentence. But the same actions—looking at images on the internet—also made him guilty of "receiving" child pornography, which carries a mandatory minimum sentence of five years (a fact that helps explain why Paroline pleaded guilty). Because Jared Fogle pleaded guilty to receiving child pornography, he was subject to the five-year mandatory minimum, and in the end he got a sentence nearly eight times as long as Paroline's. In fact, Fogle's sentence was about 50 percent longer than the one Amy's uncle received, even though her uncle repeatedly raped a prepubescent girl, while Fogle did not assault anyone.

THE FBI DISTRIBUTES CHILD PORNOGRAPHY

IT MAKES NO sense to treat possession of child pornography more harshly than violent crimes—more harshly even than actual sexual abuse of children—unless you believe that serious harm is inflicted every time someone looks at the image of a child's sexual abuse. In that case, a large enough collection of images could equal or even surpass the harm done by a single child rape, so that it could be just to impose a life sentence on someone who has done nothing but look at pictures.

Federal law enforcement officials claim to believe something like that, but it's pretty clear they don't. If they did, they would never condone the tactics that the FBI uses in child pornography cases, which include distributing it to catch people who look at it.

In a 2002 *New York University Law Review* article, Howard Anglin argued that victims of child pornographers have legal grounds to sue FBI agents who mail images of them to targets of undercover investigations. "If, as courts have held, the children depicted in child pornography are victimized anew each time it changes hands, this practice inflicts further injuries on the children portrayed in the images," wrote Anglin, at the time an NYU law student and now executive director of the Canadian Constitution Foundation. "The practice of distributing child pornography in undercover operations exposes federal agents to potential civil liability and undermines the integrity of the criminal justice system."

That argument did not deter the FBI from continuing to distribute child pornography. In 2015, after arresting the operator of The Playpen, a "dark web" source of child pornography, the bureau took over the site and operated it for two weeks. During that time, about 100,000 people visited the site, accessing at least 48,000 photos, 200 videos, and 13,000 links. The FBI not only allowed continued access to The Playpen; it seems to have made the site more popular by making it faster and more accessible. The FBI's version attracted some 50,000 visitors per week, up from 11,000 before the government takeover.

That operation resulted in criminal charges against about 200 people, mostly for receiving or possessing child pornography. But to achieve those results, the FBI became a major distributor of child pornography, thereby committing a more serious crime than the people it arrested. Federal prosecutors brought cases that, by their own lights, required agents to victimize children thousands of times. Each time the FBI distributed an image, it committed a federal crime that is punishable by a mandatory minimum sentence of five years and a maximum sentence of 20 years. If such actions merit criminal punishment because they are inherently harmful, there is no logical reason the federal agents who ran The Playpen should escape the penalties they sought to impose on the people who visited the site.

FELONIOUS CARTOONS

ANOTHER REASON TO doubt the official justification for punishing possession of child pornography is 18 USC 1466A, which makes it a crime to produce, distribute, or possess "obscene visual representations of the sexual abuse of children." That law covers "a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting" that "depicts a minor engaging in sexually explicit conduct," provided the image qualifies as obscene. Notably, "it is not a required element of any offense under this section that the minor depicted actually exist." The penalties are nevertheless the same as the penalties for producing, distributing, or possessing actual child pornography.

This law is a rejiggered version of the ban on virtual child pornography that the Supreme Court overturned in *Free Speech Coalition v. Ashcroft*. Since the Court has said obscenity is not protected by the First Amendment, Congress narrowed the ban by limiting it to material that meets the legal test for obscenity, meaning it appeals to prurient interests, depicts sexual conduct in a patently offensive way, and "lacks serious literary, artistic, political, or scientific value." But the new ban is still constitutionally problematic because the Court also has said that mere possession of obscene material cannot be punished without violating the First Amendment right to "receive information and ideas" and the sphere of privacy protected by the 14th Amendment.

Federal prosecutors seem to be getting around that problem by resolving cases involving possession of virtual child pornography through plea agreements in which the defendant gives up his right to challenge the law. In a 2010 Ohio case, a former middle school teacher named Steven Kutzner pleaded guilty to possessing "obscene visual representations of the sexual abuse of children," including cartoons featuring characters from *The Simpsons*. As part of the plea agreement, Kutzner waived his right to challenge the constitutionality of the possession charge.

Jim Peters, an assistant U.S. attorney who worked on the case, says Kutzner agreed to the deal to avoid prosecution for receiving the cartoons, which would have triggered a five-year mandatory minimum sentence. Peters adds that Kutzner's computer also contained traces of actual child pornography that Kutzner claimed he downloaded by accident and deleted. Prosecutors decided not to bring charges based on those images because they were downloaded before federal law was changed to criminalize accessing child pornography with the intent to view it. In 2011, Kutzner was sentenced to 15 months in federal prison followed by three years of post-release supervision.

Two years later, Christjan Bee of Monett, Missouri, was sentenced to three years in federal prison for "possessing an obscene image of the sexual abuse of children." Federal prosecutors said the forbidden material was "a collection of electronic comics, entitled 'incest comics,'" that "contained multiple images of minors engaging in graphic sexual intercourse with adults and other minors." Like Kutzner, Bee pleaded guilty to avoid a receiving charge, waiving his right to challenge the ban on possession.

The fact that federal law treats virtual child pornography the same as the real thing suggests the essence of the crime is not the injury inflicted on actual children by looking at pictures of their abuse but the message communicated by such images. As the USSC noted in its 2012 report, an alternative rationale for criminalizing possession of child pornography is that these images "validate and normalize the sexual exploitation of children." It is debatable whether material like *Simpsons* porn and "incest comics" actually does that. In any case, the same argument would apply with even greater force to explicit advocacy of sex with minors, such as literature produced by the North American Man-Boy Love Association. As offensive as such speech may be to the vast majority of Americans, it is clearly protected by the First Amendment.

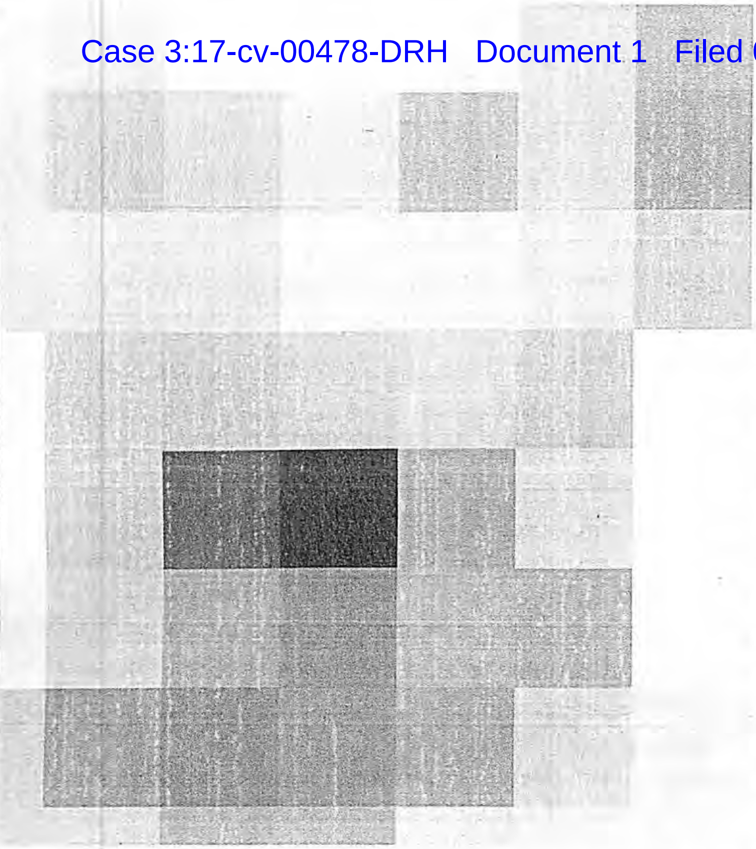
VICTIMS AS PREDATORS

THE INADEQUACY OF the child protection rationale is also clear in cases involving teenagers who use their cellphones to exchange sexually provocative pictures of themselves, thereby qualifying as both victims and perpetrators. In 2015, for example, Cormega Copening, a 17-year-old boy in North Carolina, was charged with sexually exploiting a minor, a felony punishable by up to eight years in prison, because of nude pictures he exchanged with his 17-year-old girlfriend.

Under North Carolina law (as under federal law), a "minor" for purposes of defining child pornography is anyone under 18. Hence Copening produced child pornography by *taking pictures of himself*. He could nevertheless be prosecuted as an adult for that crime. To make things even more confusing, the age of consent in North Carolina is 16, meaning that Copening could legally have consensual sex with his girlfriend. But if he (or she) made a video of that activity, even with the consent of both parties, it would be a felony punishable by years in prison plus lifelong registration as a sex offender.

The Copening case is not unique. In 2016, an Iowa prosecutor threatened to charge a 14-year-old girl with sexual exploitation of a minor for sending pictures of herself to her boyfriend. According to a federal lawsuit filed by her parents, one photo shows the girl "from the waist up, hair entirely covering her breasts and dressed in boy shorts." The other picture shows her "standing upright, clad in the same boy shorts and wearing a sports bra." These images do not seem to meet Iowa's definition of child pornography, since they do not show a minor engaged in "a prohibited sexual act," which includes prurient nudity only when it involves exposure of breasts, genitals, or buttocks. Even if the pictures qualified as child porn in Iowa, it defies logic to say a teenager can be guilty of sexually exploiting herself.

The case of Eric Rinehart underlines the counterintuitive consequences of treating pictures as a crime even when the actions they record are not. In 2006, Rinehart, a 34-year-old police officer in Middletown, Indiana, who was in the midst of a divorce, became sexually involved with two girls who were 16 and 17. Since the age of consent in Indiana is 16, it was legal for him to have sex with those girls. (Whether it was wise or appropriate is another question.) But because Rinehart also took pictures of the girls, he was convicted of producing child



pornography and sentenced to 15 years in federal prison. It did not matter that the girls consented to the pictures or that the images were never shared with anyone else.

Although Jared Fogle apparently did not record his sexual encounters with teenaged prostitutes in Manhattan, he broke state law by paying for sex and by having sex with the girls before they turned 17, the age of consent in New York. Under state law, he was therefore guilty of patronizing a prostitute, a Class A misdemeanor punishable by up to a year in jail, and rape in the third degree, a Class E felony punishable by probation or up to four years in prison. Instead, he was charged under federal law with traveling across state lines "for the purpose of engaging in any illicit sexual conduct," which is punishable by up to 30 years in prison.

Judge Pratt apparently considered that crime as serious as Fogle's viewing of child pornography, because she imposed exactly the same sentence for it: 188 months in prison. (Fortunately for Fogle, he is serving the two sentences concurrently.) Prosecutors emphasized that while the youngest prostitute Fogle hired was 16, he asked her about "access to minors as young as 14 years for purposes of commercial sex acts with him." In challenging his sentence, Fogle argued that he shouldn't be punished for something he thought about but never did.

UNINTENTIONAL CRIMES

WHILE FOGLE MAY have known how old the girls were, that is not always the case when adults have sex with teenagers. The difference between a 16-year-old and a 17-year-old (or a 15-year-old and a 16-year-old) may not be obvious, especially when the teenager claims to be older than she is. State laws nevertheless assume that someone who has sex with an underage adolescent should have known better. Generally speaking, "mistake of age" is no defense against a statutory rape charge. When it comes to sex with teens, people can break the law without realizing it—an exception to the rule that proof of *mens rea* (usually translated as "guilty mind") is required for a criminal conviction.

In 2016, a Minnesota appeals court cast doubt on that exception in a case involving a middle-aged man named Mark Moser who propositioned a girl on Facebook. She said she was 16 (the age of consent in Minnesota), but she was actually 14. Under state law, that subterfuge did not matter: Even if Moser thought she was 16, he was still guilty of soliciting sex with a minor, a felony punishable by up to three years in prison and 10 years on the state's sex offender registry. But the Minnesota Court of Appeals ruled that Moser had a due process right to raise a mistake-of-age defense.

"The child-solicitation statute imposes an unreasonable duty on defendants to ascertain the relevant facts," the appeals court said. "Where solicitation occurs solely over the Internet...it is extremely difficult to determine the age of the person solicited with any certainty." By contrast, the court said, "a defendant can reasonably be required to ascertain the age of a person the defendant meets in person." But as UCLA law professor Eugene Volokh pointed out in a blog post, that is not necessarily true: What if a girl "lied about her age, and perhaps even showed the defendant a credible-seeming fake ID"? Or what if the couple met in a context, such as a bar or a college fraternity party, where it might be reasonable to assume that everyone is old enough to consent to sex?

A mistake-of-age defense probably would not have helped Fogle even if one were available, since abiding by age-of-consent laws does not seem to have been a priority for him. Still, it's not clear that he qualifies as a pedophile—that is, someone who is sexually attracted to prepubescent children. Neither the girls he had sex with nor the ones he asked about were that young, and prosecutors say that while the minors in the pictures and videos recorded by Taylor ranged in age from 9 to 16, the youngest person in the images he shared with Fogle was 13 or 14. The images on the thumb drive that Taylor gave him included children "as young as approximately six years of age," but Fogle does not seem to have actively sought out such material.

The distinction between adolescents and prepubescent children is relevant to the seriousness of Fogle's crimes and to the sort of danger he poses. Even when people are physically ready for sex, they may not be psychologically ready, which is the rationale for age-of-consent laws. But as a press

Illustration: Joanna Andreasson

release about Fogle's case from the U.S. Attorney's Office for the Southern District of Indiana noted, "federal law provides strong punishment for engaging in commercial sex acts with minors under the age of 18 years," no matter what the age of consent is in the state where the sex acts occur. Whatever you think of these transactions, it is hard to see how the fact that they happened in New York rather than Indiana makes them worse. Yet if Fogle had paid for sex in his home state, where the age of consent is 16, instead of doing it in another state, it would have been a misdemeanor rather than a federal felony.

Leaving aside the issue of punishment, sexual attraction to prepubescent children suggests different precautions than sexual attraction to teenagers. Restrictions aimed at keeping potential predators away from kids, even if we assume they are otherwise justified, make little sense when applied to someone who has no sexual interest in young children. Yet Fogle will have to register as a sex offender for the rest of his life, subject to the same restrictions as a child molester. Such registries, which every state maintains, also include people guilty of crimes less serious than Fogle's, such as public urination, patronizing an adult prostitute, and consensual sex with a fellow teenager.

LEPER LISTS

ALTHOUGH SEX OFFENDER registries and the restrictions associated with them are supposedly intended to protect public safety, the evidence suggests they are mainly a way of imposing additional punishment on people who have already completed their sentences. The rationale for publicly accessible registries is that they will protect children by alerting parents to the presence of potential predators. But the Justice Department's National Crime Victimization Survey indicates that more than 90 percent of sexual offenses against children are committed not by strangers but by relatives, friends, or acquaintances. Furthermore, nearly 9 out of 10 sex offenses are committed by people who were not previously convicted of a crime that would have put their names in a registry. Justice Department data also indicate that sex offenders are much less likely to commit new crimes than commonly supposed—less likely, in fact, than most other kinds of offenders.

Not surprisingly, studies that try to measure the impact of registration laws find little evidence that they work as advertised. If anything, they seem to be counterproductive, probably because they make it harder for sex offenders to reintegrate into society by publicly identifying them as pariahs, limiting their job prospects, and restricting where they can live. In Michigan, for example, registrants are prohibited from living, working, or "loitering" within 1,000 feet of a school, regardless of whether their crimes involved children. A 2013 study funded by the Justice Department found those restrictions were associated with an *increase* in recidivism. A 2011 analysis in the *Journal of Law and Economics* likewise found evidence that publicly accessible registries have a perverse effect on recidivism.

If registries and residence restrictions do not actually make people safer, it's hard to justify them as public safety measures. Last August, a federal appeals court ruled that Michigan's Sex Offender Registration Act (SORA) imposes punishment in the guise of regulation, meaning it cannot be applied retroactively without violating the Constitution's ban on ex post facto laws.

In addition to the residence restrictions, the U.S. Court of Appeals for the 6th Circuit focused on the law's onerous reporting requirements and its classification system. SORA threatens registrants with prison if they fail to report, in person and immediately, changes such as new email addresses or newly borrowed cars. It also puts them in tiers that supposedly correspond to the danger they pose, but those categories are not based on individualized risk assessments. Although all of the plaintiffs in this case qualified for Tier III, supposedly the most dangerous category, one of them was convicted at age 18 of having consensual sex with his 14-year-old girlfriend, while another was convicted of "a non-sexual kidnapping offense arising out of a 1990 robbery of a McDonald's." The appeals court said the residence restrictions, reporting requirements, and arbitrary classification system distinguished SORA from the Alaska registry that the Supreme Court upheld in 2003, deeming it regulatory rather than punitive.

"SORA brands registrants as moral lepers solely on the basis of a prior conviction," the 6th Circuit said. "It consigns them to years, if not a lifetime, of existence on the margins, not only of society, but often, as the record in this case makes painfully evident, from their own families, with whom, due to school zone restrictions, they may not even live. It directly regulates where registrants may go in their daily lives and compels them to interrupt those lives with great frequency in order to appear in person before law enforcement to report even minor changes to their information." The court concluded that "the punitive effects of these blanket restrictions...exceed even a generous assessment of their salutary effects."

Like registration and the burdens associated with it, the continued imprisonment of sex offenders who have completed their sentences bears a strong resemblance to punishment. Twenty states and the federal government have laws allowing indefinite "civil commitment" of certain sex offenders. The Supreme Court has upheld such laws on the pretext that what looks like punishment is actually "treatment" aimed at curing offenders who would otherwise pose an intolerable threat to public safety.

Taking the Court at its word, a federal judge ruled in 2015 that the Minnesota Sex Offender Program (MSOP), which was established in 1994, did not qualify for this loophole because none of its "patients" had ever been declared well enough for unconditional release. "The overwhelming evidence at trial

FBI TACTICS INCLUDE DISTRIBUTING CHILD PORNOGRAPHY TO CATCH PEOPLE WHO LOOK AT CHILD PORNOGRAPHY.

established that Minnesota's civil commitment scheme is a punitive system that segregates and indefinitely detains a class of potentially dangerous individuals without the safeguards of the criminal justice system," wrote U.S. District Judge Donovan Frank. "It is fundamental to our notions of a free society that we do not imprison citizens because we fear that they might commit a crime in the future....This strikes at the very heart of what it means to be a free society where liberty is a primary value of our heritage."

Criticizing Frank's decision, Minnesota Gov. Mark Dayton exposed the fallacy at the core of his state's program. "It's really impossible to predict whether or not [sex offenders] are at risk to reoffend," Dayton said. "So the more protection you can give to the public, as far as I'm concerned, given their history, is entirely warranted, and that's what this program does right now." Yet the law authorizing the program *requires* predictions about whether or not sex offenders "are at risk to reoffend"; if such predictions are "impossible," the whole law is a crock.

It gets worse. "I don't think any parent in Minnesota wants to subject their daughter or their son to a probability," Dayton said. "They want to make sure their government is doing absolutely everything conceivably possible to make it 100 percent safe to walk in the park or to or from school." So even if recidivism were predictable, Dayton would say that someone who is 99 percent guaranteed not to reoffend should nevertheless be locked up for the rest of his life. Just in case.

In January, a federal appeals court sided with Dayton, saying Judge Frank was mistaken in concluding that the MSOP violates detainees' substantive due process rights. The U.S. Court of Appeals for the 8th Circuit said Frank was wrong to think the MSOP impinges on a fundamental liberty interest—i.e., the right not to be locked in a cage for the rest of your life. After all, the 8th Circuit said, the Supreme Court "has never declared that persons who pose a significant danger to themselves or others possess a fundamental liberty interest in freedom from physical restraint."

The appeals court was unimpressed by the fact that the MSOP manifestly fails to accomplish what it purports to be doing: rendering sex offenders "no longer dangerous" by treating their statutorily defined mental conditions. Although "the Supreme Court has recognized a substantive due process right to reasonably safe custodial conditions," the 8th Circuit said, it has never recognized "a broader due process right to appropriate or effective or reasonable treatment of the illness or disability that triggered the patient's involuntary confinement."

The appeals court said Frank wrongly applied "strict scrutiny" to the MSOP when he should have taken a much more deferential approach. To decide whether Minnesota's law is unconstitutional on its face, it said, Frank should have asked whether it passes the "rational basis" test—a highly permissive standard that all but guarantees a challenged law will be upheld. The 8th Circuit said Frank also erred in ruling that Minnesota's law is unconstitutional as applied to the plaintiffs. To prevail on that claim, the court said, the plaintiffs had to show their confinement not only violates a fundamental right but "shocks the conscience," which is pretty hard to do for any kind of imprisonment this side of a Nazi concentration camp.

'DO WE NEED A WHOLE NEW CONSTITUTION?'

THE UPSHOT OF such judicial deference is that laws targeting sex offenders will be upheld as long as supporters of those laws claim to have good intentions. The so-called International Megan's Law (IML), enacted in 2016, shows how thin the justifications can be.

The IML requires that the State Department create "a visual designation affixed to a conspicuous location" on the passport of anyone listed in a registry for "a sex offense against a minor," to make sure they are properly scrutinized, shunned, and harassed wherever they might travel. It also authorizes notification of foreign officials about the travels of sex offenders who are no longer required to register.

The law is supposedly aimed at people who visit other countries to have sex with children, which seems to be a pretty rare crime. According to Justice Department data, about 10 Americans are convicted of "sexual crimes against minors in other countries" each year. As the IML itself notes, the State Department already had "authority to deny passports to individuals convicted of the crime of sex tourism involving minors." The provision requiring "unique passport identifiers" sweeps much more broadly, covering any registered sex offender who was convicted of a crime involving a minor, regardless of the details, when the crime occurred, or whether the offender poses an ongoing threat.

The Americans whose passports will brand them as international child molesters include people who committed their offenses as minors and even people who still are minors (as are more than a quarter of registered sex offenders). They include people who as teenagers had consensual sex with other teenagers. They include people convicted of misdemeanors. They include people who committed their crimes decades ago and have never reoffended. They include people convicted of sexting, streaking, or public urination. The IML treats all of these people as a menace to children everywhere.

Sex offenders are a heterogeneous group that includes many people who pose little or no threat to the public while omitting many people who are clearly more dangerous. It makes no sense to impose the same restrictions on all of them simply because their crimes had something to do with sex. "They have it set up now where Charles Manson is a nicer person than a sex offender," remarked a registered sex offender who was interviewed for the 2013 Justice Department–funded study of residence restrictions.

"You created a whole new population of people that you are not prepared to deal with at all," another sex offender observed in the same study. "If you are not going to remove them completely from society or off of the planet, just what the hell are you going to do with them after you create this leper colony?...I mean, do we still come up under the Constitution? Do we still have the same rights as other folks? Do we need a whole new constitution for us?"

Sex offenders are consigned to a kind of legal and social limbo that is neither fair nor prudent. They supposedly have paid their debts to society but are constantly obstructed in their efforts to rejoin it. Even when their crimes did not involve assaults of any kind, they are subject to burdens that murderers and other violent criminals escape.

A lawsuit challenging the IML argued that "individuals convicted of sex offenses constitute a discrete and insular minority that is uniquely subject to public and private discrimination, and whose rights are uniquely subject to unconstitutional deprivation by state action, including by state action that is motivated by malice, that is arbitrary and capricious, that bears no rational relationship to any legitimate government purpose, and that is not sufficiently tailored to serve a legitimate government purpose." All of that is true, but the same unreasoning prejudices that created this situation make it hard to change.

Dismissing the IML lawsuit last September, a federal judge in San Francisco said specially marked passports for sex offenders do not amount to retroactive punishment, because registration of sex offenders, no matter how far-reaching and life-crippling the consequences, is not punitive and therefore does not implicate the Ex Post Facto Clause. If registration is not a punishment, U.S. District Judge Phyllis Hamilton reasoned, sharing information from a registry with foreign officials surely cannot be, even if the upshot is that an American citizen cannot travel internationally and therefore cannot see his wife, do his job, attend to his business, or claim his inheritance in Iran without risking summary execution (all concerns raised by the plaintiffs).

Based on similar logic, Hamilton rejected the plaintiffs' due process claim, saying they got all the process they were due when they were convicted. In her view, the IML merely passes along information about those convictions to foreign authorities, who can do with it what they want. Why should the U.S. government be held responsible for the foreseeable consequences of branding American citizens as pariahs, perverts, and predators?

Hamilton also made short work of the plaintiffs' substantive due process and equal protection claims, saying they could not succeed because the IML easily satisfies the rational basis test. The only question under that standard, Hamilton explained, is "whether there is some conceivable rational purpose that Congress could have had in mind when it enacted the law." The IML is aimed at preventing "the commercial sexual exploitation of minors," which is a rational purpose. Whether the law actually serves that purpose is beyond the scope of rational basis review. So is the fairness and wisdom of including anyone convicted of "a sex offense against a minor," even if he never assaulted anyone and never demonstrated a propensity to visit other countries for the purpose of having sex with minors.

The passport and notification provisions apply decades after the offense, whether or not the offender currently poses a threat, and notification applies even to offenders who are no longer required to register. One of the plaintiffs, who "routinely travels to Europe and Asia for business purposes," was convicted 25 years ago. Another plaintiff, who committed a crime minor enough that he was sentenced only to probation and was initially told he would not have to register as a sex offender, will nevertheless have to carry a special passport. A third plaintiff had his 1998 conviction expunged, was reinstated as a lawyer, and is no longer listed in California's registry but is still covered by the IML's notification provision.

Stigmatizing these people as a threat to children everywhere for the rest of their lives may seem irrational, but that does not mean it fails the rational basis test. "Under rational basis review," Hamilton explained, "a law 'may be overinclusive, underinclusive, illogical, and unscientific and yet pass constitutional muster.'"

What's true of the IML is true of many laws targeting sex offenders: Even if they are poorly designed to achieve their ostensible goal, politicians say they will protect children, and that's rational enough for government work. ■

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